Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
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80-1734

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. MILTON MARGOLES,

Petitioner,

vs.

DR. THOMAS W. TORMEY, JR.
and LEROY L. DALTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April 14, 1981

QUESTIONS PRESENTED

The Questions Presented are all against the factual background which includes two key elements found by the jury under special interrogatories and not overturned by the Seventh Circuit:

... Knowing dissemination by Defendants (medical licensing officials of Wisconsin) of false information, in bad faith, about Plaintiff to Illinois medical licensing authorities, and

... Consequent denial of a medical license to Plaintiff by the Illinois authorities and, a fortiori, denial of medical employment opportunities.

The First Question

To establish a claim under 42 U.S.C. §1983 based on "interstate" denial of a fair hearing, must Plaintiff prove that the officials of one state (where the wrongful conduct originated)

engaged in "collusion, conspiracy, or agreement" with the officials of another state (where the effect of the conduct was felt), or is some lesser degree of interstate official involvement sufficient?

The Second Question

Did the Seventh Circuit misapply two key civil rights decisions of this Court (Paul v. Davis, 424 U.S. 693, (1976) and Board of Regents v. Roth, 408 U.S. 564, (1972)) in holding that denial of medical licensure in Illinois caused by dissemination of false information by Wisconsin officials acting in bad faith does not meet the so-called "stigma plus" test imposed by those two decisions?[1]

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[1] Subsidiary Questions Involving Related Issues; Additional Parties: Should the Court deem the two questions

(footnote #1 continued)

above as worthy of granting a Writ of Certiorari, Petition suggests several subsidiary questions involved in the resolution of this case by the District Court but not addressed by the Seventh Circuit (Appendix A-13, n. 12):

3. Did the District Court err in requiring Plaintiff-Petitioner to prove that wrongful interference by Defendant officials of the Wisconsin State Board of Medical Examiners was the substantial cause of denial of licensure and employment in other state, instead of that it occurred in connection with or was "reasonably related to, the alteration of the right or interest?" (cf: Marrero v. City of Hialeah, 625 F.2d 499, 518 (5th Cir., 1980), quoting Owen v. City of Independence, 100 S.Ct. 1398, 1406 n. 13 (1980))

4. Are the Defendants entitled to the protection of res judicata regarding Counts I and IV as held by District Judges Crabb and Morgan? (See A-21, 23, 65-69; In the first of two decisions in this case, the Seventh Circuit affirmed the application of res judicata to Count IV. (A-31)) This could involve reinstating Defendants Donald Pressentin, board investigator; and board members Drs. F.A. Ross, Thomas E. Henney, Robert G. Zach, G. Stanley Custer, John J. Satory, David J. Twohig, H.G. Withrow, and Benjamin Lawton.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

All of the opinions below are attached hereto in Appendix A. No petition for rehearing was filed with respect to the March 12, 1981, opinion of the United States Court of Appeals for the Seventh Circuit, affirming judgment notwithstanding the verdict. Plaintiff-Petitioner had appealed from the order and judgment of January 10, 1980, of the District Court for the Western District of Wisconsin, which granted judgment notwithstanding the verdict. (The opinion is unreported.)

Also reproduced in Appendix A are the July 25, 1975, order of the District Court partially granting Defendants' first motion for summary judgment (reported at 67 F.R.D. 666, 1975), and the February 23, 1978, order of the District Court granting Defendants' second motion for summary judgment (reported at 446 F.Supp. 959, 1978), and the unreported August 15, 1978, opinion of the Seventh Circuit partially reversing the order which had granted the motion for summary judgment.

JURISDICTION

The final judgment of the Court of Appeals in this case was entered on March 12, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 -- Civil action for deprivation of rights:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The Key Facts

This case can be resolved on a very few key facts:

1. Defendants, Wisconsin medical licensing officials, maliciously or in bad faith, supplied false information about Plaintiff, to the Illinois medical licensing authorities at the time Plaintiff's application for a license was pending. The jury found this to be a fact and the Seventh Circuit assumed that it was proven.

2. The false information was the substantial factor in causing the Illinois authorities to deny medical licensure to Plaintiff in 1969. This, too, was found by the jury to have been established at the trial. (Answer to special interrogatory 7)

Strangely, this second fact is mentioned nowhere in the Seventh Circuit Circuit's decision, although it is the key to the violation of Plaintiff's constitutional rights.

Factual Background

The case involves Dr. Milton Margoles' attempts from 1964 to 1970 to obtain licensure and to practice medicine in Wisconsin and other states. Defendant Dr. Thomas W. Tormey, Jr. was a member and secretary of the Wisconsin State Board of Medical Examiners from 1954 to 1973. During that time, he was responsible for communications from the Board to officials in other states. (Transcript Vol. III-p. 90) Defendant LeRoy L. Dalton was counsel for the Board from 1968 to 1970. (Tr. III-p. 145) The Board is responsible for

licensing of physicians in the state of Wisconsin. Revocations and relicensing during all relevant times were performed by the Circuit courts acting on the Board's recommendations.

In 1963, the Circuit Court for Milwaukee County revoked Dr. Margoles' license, upon recommendation of the Board. This action was based on his conviction for violation of the U.S. Internal Revenue Code. Dr. Margoles also had been charged with attempting to bribe a judge, but he was acquitted of this charge; he was, however, convicted of lesser charges of attempting to obstruct justice and influence an officer of the court, and communicating with a juror. (Tr. IA-pp. 6-7; IB-pp. 9, 33) (He received a full Presidential Pardon in 1972.) After Dr. Margoles had

served his sentence, the Medical Board held two formal hearings (in 1965 and 1969) on his petitions for reinstatement. The Board voted twice to deny licensure.

By 1967, a number of other states and the District of Columbia were granting medical licensure to Dr. Margoles notwithstanding Wisconsin's refusal to reinstate him. (The other license he held before 1960, in California, which also had been rescinded following Wisconsin's action, was restored in 1969.) He wanted to accept one of several job opportunities in Illinois, but the Illinois Medical Examining Committee previously had taken the position that it would not approve his application until his Wisconsin license was reinstated.

In 1967, the Wisconsin Board suggested that Dr. Margoles supply an affidavit stating that if he were granted a Wisconsin license, he would not practice in Wisconsin but would use it only to meet licensing requirements of Illinois. (Tr. IB-p. 38; II-pp. 187 et seq.) The affidavit subsequently was submitted. Dr. Tormey then wrote a letter in August, 1967, to the Circuit Court in Milwaukee, castigating Dr. Margoles for originating the affidavit idea and recommending denial of relicensure on this basis. (Plaintiff's Exhibit 37) Dr. Tormey sent this letter to the Illinois authorities and, as a result, licensure was not granted in Illinois in 1967. (Tr. II-pp. 187, 190-191) Perry Margoles, the Doctor's

son, later told Dr. Tormey of his consternation about the affidavit issue and reminded Dr. Tormey that the affidavit had been Dr. Tormey's suggestion. (Tr. II-p. 189; III-pp. 14-15)

In 1969, Dr. Margoles again was seeking licensure in Illinois. In an effort to break the impasse with the Illinois Board, Perry Margoles met with Dr. Tormey and asked him to set the record straight by writing a letter confirming that the affidavit idea had originated with the Wisconsin Board. (Tr. II-p. 191) Dr. Tormey wrote and signed a letter to that effect. (Tr. II-pp. 191-192; Pl. Exh. 39)

Dr. Tormey met shortly thereafter with the Wisconsin Board's counsel, Defendant LeRoy L. Dalton, and working

together, they wrote and sent a letter (signed by Dr. Tormey) contradicting the earlier letter and stating that the affidavit had been first suggested by Dr. Margoles and not by the Board. (Pl. Exh. 40) They enclosed the Board's 1967 letter to the Circuit Court which severely criticized Dr. Margoles for the affidavit, describing it as placing in doubt his "moral and professional character." (Tr. IV-pp. 133-134). Dr. Tormey never informed Dr. Margoles of this second letter and did not send him a copy.

When Dr. Margoles and Perry met a few days later with the Illinois licensing authorities, they were confronted with the surprising second Tormey letter. The chairman, Dr. Kenneth

Schnepp, held it up, said that Dr. Margoles had lied about the affidavit issue, and concluded that because Dr. Margoles was not credible an Illinois license would be denied. (Tr. II-p. 195) Dr. Schnepp later wrote a letter indicating that the affidavit issue was the primary basis for denying licensure to Dr. Margoles. (Pl. Exh. 43) Dr. Schnepp's deposition testimony was read into evidence. He testified that several factors were involved in the Illinois decision to deny licensure, one of which was the affidavit issue. (Tr. III-pp. 48, 54, 56) (Ultimately, the Illinois Board approved Dr. Margoles' application a year later.)

At the trial of this case, these are the special verdict questions that

the jury answered regarding the "affidavit" issue (Record Doc. #128):

"Did the defendant Thomas Tormey, Jr. violate the plaintiff's constitutional right to obtain a fair hearing on his application for medical licensure in the State of Illinois by his act of sending a letter dated September 24, 1969, to Kenneth Schnepp, Chairman of the Medical Board of Illinois, which is plaintiff's exhibit 40? Answer: Yes.

In sending the letter dated September 24, 1969, (plaintiff's exhibit 40) was defendant Thomas Tormey, Jr. acting in bad faith or without a reasonable belief that his act was constitutional? Answer: Yes.

Did the defendant LeRoy Dalton draft the letter sent by defendant Tormey to Kenneth P. Schnepp on September 24, 1969, which is plaintiff's exhibit 40? Answer: Yes.

Did the defendant LeRoy Dalton violate the plaintiff's constitutional right to obtain a fair hearing on his application for medical licensure in the State of Illinois by his act of drafting a letter dated September 24, 1969, to Kenneth Schnepp, Chairman of the Medical Board of Illinois, which is plaintiff's exhibit 40? Answer: Yes.

In drafting the letter dated September 24, 1969, (plaintiff's exhibit 40) was defendant LeRoy Dalton acting in bad faith or without a reasonable belief that this act was constitutional? Answer: Yes."

Following are the instructions given by the District Court with respect to these questions (Record Doc. #129):

"In order to find that Defendant Tormey violated plaintiff's constitutional right to a fair hearing, you must find a reasonable certainty by the greater weight of the credible evidence

FIRST: that defendant Tormey wrote and sent the letter with the knowledge that the statement about the origin of the affidavit idea was false; and

SECOND: that defendant Tormey wrote and sent the letter with the intent to prevent plaintiff from obtaining a fair hearing on his application for medical licensure in the State of Illinois; and

THIRD: that the false statement in the letter was the substantial factor preventing plaintiff from obtaining a fair hearing in 1969 on his application for medical licensure in the State of Illinois." (Trial Transcript Vol. V-pp. 134-135)

The same instructions were repeated with respect to Dalton, with the following instruction added:

"Question no. 5 asks you to find whether defendant Dalton drafted the September 24, 1969, letter which is plaintiff's exhibit no. 40. In order to answer this question "yes", you must find to a reasonable certainty by the greater weight of the credible evidence that defendant Dalton composed, suggested, or wrote substantially all of the material portions of the letter."

The Proceedings in the Courts Below

Shortly after this case was commenced, the District Court denied a motion to dismiss against officials of the Wisconsin medical board, but granted it as to the board as an entity.

Several months before trial was to be held in 1975, Defendants-Respondents filed their first motion for summary judgment. Count I (interstate Civil Rights violation) survived as to the

board secretary and counsel. Count II (conspiracy) was struck. Count III (slander by the board chairman) survived. Count IV (denial of Civil Rights in Wisconsin) was dismissed on the ground of res judicata (A-50, 69-70). The District Court refused to certify the issues for interlocutory appeal.

In 1977, Defendants brought a second motion for summary judgment. On the basis of qualified immunity as to Count I and absolute immunity as to Count III, the rest of the case was dismissed. (A-32, 49) On appeal, Count I only was reinstated by the Seventh Circuit as to the board secretary (Dr. Tormey), counsel (Dalton), and investigator (Donald Pressentin). (A-27, 30-32)

Trial finally occurred at the end of 1979. At the conclusion of the Petitioner's case, the District Court dismissed Pressentin from the case. The jury found that the board secretary and counsel had violated Petitioner's civil rights in 1969 in conjunction with the denial of his application for Illinois medical licensure. It found that the secretary had not done so in 1964. Before the jury was to consider damages, the District Court granted Defendants' motion for judgment notwithstanding the verdict. (A-15, 26) The Court of Appeals for the Seventh Circuit affirmed. (A-1, 13)

Petitioner seeks reinstatement of Count I (interstate) as to board secretary Dr. Tormey and counsel Dalton, and Count IV (intrastate) as to all of the original Defendants.

REASONS FOR GRANTING THE WRIT

The tortuous path this case has taken and the difficulty we shall point out in analyzing the Seventh Circuit's decision, stem in great part from the fact that the law is so unclear in a §1983 case involving defamation causing loss of future employment opportunities and even more unclear where the defamation involves government officials in two states.

The Seventh Circuit Decision

The Seventh Circuit properly held that Plaintiff "has a protected liberty interest in pursuing his profession" and that "if Plaintiff can establish that Defendants, under the color of law, have interfered with that right and are not protected by qualified immunity, he has established a claim cognizable under 42 U.S.C. §1983." (A-8)

The Seventh Circuit states--correctly--that there is no claim here that the Illinois authorities violated

Plaintiff's constitutional rights. (A-8) It then goes on to discuss, separately, two theories: (1) whether there was an unconstitutional interference by the Wisconsin officials with Plaintiff's right to a fair hearing in Illinois, and (2) whether there was defamation in conjuncton with the denial of a constitutionally protected privilege in Illinois, i.e., medical licensure. The latter theory is analyzed as stemming from defamation coupled with loss of a constitutionally protected right--the "stigma plus" test of Paul v. Davis, 424 U.S. 693 (1976), and Board of Regents v. Roth, 408 U.S. 564 (1972).

We have difficulty in perceiving any difference of real substance between the two theories in the context of the

of this case, but because the question in this petition relates to the effect of the Seventh Circuit's decision on other cases and other courts, we shall discuss the two theories separately just as other courts may consider them separately. For convenience, we shall call the first theory the "interstate fair hearing" theory, and the second the "stigma plus" theory.

The Interstate Fair Hearing Theory

> **This Court's guidance is needed on the novel question whether, in a 1983 interstate defamation case, the person who has lost employment opportunities must prove collusion, conspiracy, or agreement between the officials of the respective states and, if not, what the correct test should be.**

In its short and, we believe, quite confusing discussion of the "fair hearing" problem, the Seventh Circuit first poses it as involving a claim based on Defendants' "active involvement in and distortion of" the Illinois licensing proceedings:

> "It would be a significantly different case if there were some evidence of collusion, conspiracy, or agreement between the government officals involved...Lacking such evidence in this case, we must conclude that Plaintiff failed to establish an constitutional deprivation as a result of Defendants' limited involvement in the Illinois proceedings." (A-9)

It is this language which led Circuit Judge Cudahy, concurring, to state:

> "I concur in the reasoning and result of the majority opinion except to the extent that it may suggest that "collusion, conspiracy, or agreement between the government officials involved" would be requisite to a successful Section 1983 claim based on an "interstate" denial of a fair hearing." (A-14)

Judge Cudahy expresses the fear that in an interstate situation this theory could allow state boundaries to provide an improper "shield" against constitutional tort liability.

Consider the case where a sheriff wrongfully shoots a person across a state line--or where a stream deliberately polluted flows from one state into another state. Does the state line in such cases (and this case) create a different test or a lesser degree of liability?

In a situation such as the jury found here--where the Wisconsin medical board officials, acting in bad faith, disseminated false information which had the effect of poisoning the minds of Illinois medical board officials against Petitioner--to require "collusion, conspiracy, or agreement" on the part of the recipients in addition to the bad faith of the senders--is to effectively abrogate the viability of §1983 in a major context in which interstate civil rights violations involving defamation may occur. As such, if this is the rationale of the Seventh Circuit, it is discordant with the view of this Court that actions under §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

Monroe v. Pape, 365 U.S. 167, 187 (1961). CF: Marrero v. City of Hialeah, 625 F.2d 499, n. 23 at 516 (5th Cir., 1980); Davis v. Knud-Hansen Memorial Hospital, 635 F.2d 179, 185 (3rd Cir., 1980)

This is a significant constitutional question of first impression to this Court. Indeed, it is the interstate aspect of this case that so troubled District Judge Crabb that she reversed herself on the law between her pre-trial order and her order granting judgment n.o.v. (See A-16-17, 21-22)

In an interstate case, is the standard "collusion, conspiracy, or agreement between the officials involved?" If some lesser standard is appropriate,

what is it? We emphasize, again, that the jury found that the Illinois authorities denied licensure to Petitioner because of the Defendants' actions. We remain totally mystified as to why this is not an "active involvement in or distortion of the Illinois proceedings."

The Seventh Circuit does not clearly answer these questions, and this is certain to cause confusion whenever this issue arises in the federal system and could effectively deny §1983 recourse where the effects of wrongful acts under color of law occur in another state.

It is worth noting in this connection that 42 U.S.C. §1983 expressly refers to state action against an individual which "subjects" him or "causes" him to be subjected to a deprivation of civil rights. (emphasis

added) (Cf: Morrison v. Jones, 607 F.2d 1269, 1275 (9th Cir., 1979)) In other words, if one person harms another (e.g., physically), there is a direct deprivation. But there can also be a deprivation where one person causes another to lose his constitutional rights. That is precisely the case here.

By raising this element of causation (the Wisconsin officials causing the denial of Illinois licensure) we are not trying to argue the merits of the case. Rather, we raise the question as to how another court can obtain any guidance from the Seventh Circuit's decision as to what degree of proof is necessary to establish an unconstitutional interstate interference in an interstate professional licensing situation.

What proof could there be that would be (a) less than "collusion, conspiracy or agreement between the government officials involved," and (b) more than denial of licensure by one set of officials because of the actions of the other set of officials?

We submit that the Seventh Circuit's treatment of the issue is certain to cause confusion in other federal courts just as it did Circuit Judge Cudahy in his concurring opinion. It may also defeat the broad civil rights protection which §1983 was intended to provide, simply because the action occurred in an interstate setting.

Removing the possibility of confusion and preventing undue limitation of §1983 rights surely are reason for this Court to grant the Writ of Certiorari.

The "Stigma Plus" Theory

The problem here is that the Seventh Circuit has misapplied two key decisions of this Court.

The Seventh Circuit discusses what it calls the "remaining issue" after disposing of the "interstate fair hearing" theory discussed above:

> "The remaining issue is whether Plaintiff has established a denial of any constitutionally protected liberty interest by proof that Defendant officials knowingly and maliciously supplied damaging false information about Plaintiff to the authorities of another government entity that was considering Plaintiff's application for professional licensure." (A-9)

The Seventh Circuit proceeds to apply the "stigma plus" test of Paul v. Davis, 424 U.S. 693 (1976) and Board of Regents v. Roth, 408 U.S. 564 (1972), and concludes that Plaintiff established

the "stigma" but not the "plus":

> "Plaintiff's claim fails to establish that Defendants' defamation was "in conjunction" with the denials of licensure in Illinois." (A-13; emphasis is the court's.)

First, as noted earlier, we remain puzzled as to the distinction between the Seventh Circuit's "interstate fair hearing" theory (was there an active involvement in or distortion of the Illinois proceedings by the Wisconsin officials and, if so, is that a denial of Plaintiff's constitutional rights) and the "stigma plus" theory (was the defamation "in conjunction" with the denial of licensure in Illinois). At least arguably, these are merely different ways to state the same issue--did the Wisconsin-originated defamation introduced into the Illinois proceedings

prevent Plaintiff from practicing his profession in Illinois? If so, there was interference with a fair hearing right in Illinois and an interference with Plaintiff's constitutionally protected liberty interest in practicing his profession?

Again, we encounter that key fact found by the jury and totally ignored by the Seventh Circuit--that Illinois denial of licensure was caused by the defamation. In view of this, it passes understanding how the Seventh Circuit could conclude that the defamation was not "in conjunction with the denial of licensure in Illinois." (A-13)

We raise this point not to argue the factual merits of the case, but to emphasize the legal problem. If this proof does not satisfy the "plus"

portion of the "stigma plus" test of Paul v. Davis and Board of Regents v. Roth in an interstate case, what can?

We suggest these two aspects of the Seventh Circuit decision:

1. The Seventh Circuit has imposed a stricter test on the "plus" portion of the "stigma plus" test than this Court has intended and other circuits have utilized; and

2. There will inevitably be confusion in other courts as to what standard to apply under Paul v. Davis and Roth in a case involving defamation in an interstate setting leading to loss of professional licensing and employment opportunities.

Repeatedly, other circuits have indicated that governmental defamation leading to loss of employment would be

sufficient to support a claim of denial of constitutional rights:

> First Circuit in Ventetuolo v. Burke, 596 F.2d 476, 482-483, 1979;
>
> Fourth Circuit in Ledford v. Delancey, 612 F.2d 883, 886-887, 1980;
>
> Fifth Circuit in Marrero v. City of Hialeah, 625 F.2d 499, 515, 1980;
>
> Eighth Circuit in Clark v. Mann, 562 F.2d 1104, 1116, 1977; and
>
> District of Columbia Circuit in Mazaleski v. Treusdell, 562 F.2d 701, 712-713, 1977.

It is difficult to see any legal difference between defamation affecting employment as suggested in the above-cited cases and defamation affecting employement as involved in this case where the Seventh Circuit has held that defamation leading to loss of licensure and employment opportunity in an

interstate setting is not sufficient to support a finding of denial of constitutional rights. One of two conclusions must inevitably follow:

1. The Seventh Circuit decision is in conflict with the criteria recognized by other circuits, or

2. The Seventh Circuit decision can be distinguished because of the interstate setting.

Either of these two conclusions is, we submit, sufficient to warrant the granting of the Writ of Certiorari. Conflict is a clear ground for the Writ. A conclusion that the test of Paul v. Davis and Roth varies with an interstate setting raises a very substantial and important issue of constitutional law, and this also is clear ground for issuing the Writ.

The dilemma in trying to interpret the Seventh Circuit's decision cannot, we submit, be avoided by disputing the facts. The Seventh Circuit states in conclusion, quite erroneously, that "Plaintiff's claim is reduced to an allegation that these Defendants made defamatory statements about Plaintiff to the Illinois licensing authorities." (A-13) Again, the Seventh Circuit dons the blinders, as they did throughout their decision.

Plaintiff's claim is that Defendants made defamatory statements about Plaintiff to the Illinois licensing authorities and that as a result medical licensure was denied in Illinois.

The latter is the element that inevitably will lead to confusion in an

important area of federal constitutional law. Nowhere does the Seventh Circuit decide that this key element was not properly found by the jury. Therefore, for purposes of analyzing the Seventh Circuit decision, we must take it as holding that:

1. Where defamatory statements were made by officials of one state to officials of another state, and

2. Where those statements lead directly to a denial of professional licensure,

3. There is no denial of a constitutional right. To repeat, this is either a flat repudiation of Roth and Paul v. Davis or, at the least, it will lead certainly to confusion in applying the test of these cases in an interstate setting.

CONCLUSION

For all the reasons set forth above, we respectfully submit that this is a case of such importance as to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1176

DR. MILTON MARGOLES,

Plaintiff-Appellant,

v.

DR. THOMAS W. TORMEY, JR. and LEROY L. DALTON,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 70 C 151—Barbara B. Crabb, *Judge.*

ARGUED JANUARY 21, 1981—DECIDED MARCH 12, 1981

Before SPRECHER and CUDAHY, *Circuit Judges,* and SPEARS, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This appeal presents the question of whether the officials of one state have violated the constitutional rights of an applicant for medical licensure in another state by knowingly providing allegedly false information about the applicant to the licensing authorities of the second state. Plaintiff, Dr. Milton Margoles, appeals from the judgment of the district court awarding judgment notwithstanding the verdict to defendants. We affirm.

* Honorable Adrian A. Spears, Senior District Judge for the Western District of Texas, is sitting by designation.

I

For many years prior to 1962, plaintiff was licensed as a physician in Wisconsin and in several other states; he practiced medicine primarily in Milwaukee, Wisconsin. In June, 1960, plaintiff was convicted of several violations of the Internal Revenue Code and was sentenced to serve one year in prison and to pay $15,000 in fines. On October 12, 1960, plaintiff was convicted of attempting to influence an officer of the court and to obstruct justice and was sentenced to serve five years in prison and to pay $5,000 in fines. Plaintiff also was acquitted of a charge of attempted bribery. On June 6, 1961, plaintiff was convicted of communicating with a juror and was sentenced to serve six months in prison and to pay $1,000 in fines.

Pursuant to an action commenced by the state district attorney, and pursuant to a recommendation of the Wisconsin State Board of Medical Examiners ("Board"), plaintiff's license to practice medicine and surgery in Wisconsin was revoked on February 26, 1962 by the Circuit Court of Milwaukee County.[1] Following plaintiff's convictions and the revocation of his Wisconsin license, his physician's licenses in other states also were revoked or suspended by those states. Plaintiff was released from prison on parole on September 15, 1962. His parole term expired in September, 1966.

Following plaintiff's release from prison, plaintiff commenced an unsuccessful campaign to regain his Wisconsin medical license. Formal hearings were held in 1965 and 1969 by the Wisconsin State Board of Medical Examiners on plaintiff's applications for relicensure, both resulting in recommendations by the Board that plaintiff be denied relicensure. The latter denial of licensure was upheld by the Wisconsin Supreme Court. *Margoles v. State Board of Medical Ex-*

[1] In Wisconsin, revocation of medical licenses is performed by the circuit court. Wis. Stat. § 448.18(2) (1977). Relicensure also is accomplished by the circuit court, but only upon the written recommendation of the Board. Wis. Stat. § 448.18(4) (1977).

aminers, 47 Wis.2d 449, 177 N.W.2d 353 (1970). Plaintiff also sought, with mixed results,[2] licensure in other states, including Illinois.

This suit concerns plaintiff's attempts in 1964-65 and in 1969 to gain licensure in Illinois. This case, originally filed on June 11, 1970, has taken a tortuous route,[3] culminating in a five day jury trial in December, 1979 before Judge Crabb of the United States District Court for the Western District of Wisconsin. The defendants

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[2] The record is somewhat unclear, but it appears that plaintiff has been granted licenses in California, the District of Columbia, Indiana, Michigan, New Jersey and Vermont. After the filing of the original complaint in this suit in 1970, plaintiff was granted a license by the State of Illinois. But, the current status of that license apparently is contested as a result of events unrelated to this proceeding.

[3] This suit originally was in four counts against numerous defendants who were members of or connected with the Board. On July 25, 1975, Judge Morgan, then presiding over this case, granted summary judgment in favor of all defendants as to counts two, three, and four. With respect to count one, Judge Morgan granted summary judgment to all defendants except the defendants here, Dr. Thomas W. Tormey, Jr. and LeRoy L. Dalton. *Margoles v. Ross*, 67 F.R.D. 666 (W.D.Wis. 1975).

Subsequently, on February 23, 1978, Judge Morgan granted summary judgment to the remaining defendants on the grounds of qualified official immunity. *Margoles v. State Board of Medical Examiners*, 446 F.Supp. 959 (W.D.Wis. 1978).

On appeal to this court, we reversed the grant of summary judgment based on qualified immunity. We held that there were triable issues of fact concerning the defendants' good faith. We also affirmed the award of summary judgment as to the other defendants and the other counts. *Margoles v. Ross*, No. 78-1354 (7th Cir. Unpublished Order Aug. 15, 1978).

When the case finally went to trial it involved Tormey, Dalton, and a third defendant, Donald Pressentin. Pressentin earlier had been dismissed on the basis of the first summary judgment decision, but later was reinstated. At the close of plaintiff's case, the district court granted a directed verdict in favor of Pressentin. Plaintiff does not contest the propriety of that action.

before us now are Dr. Thomas W. Tormey, Jr. and LeRoy L. Dalton, individually and in their official capacities. Tormey served as a member and Secretary of the Board from July, 1953 through July, 1963, and from July 1965 through July, 1973. He was employed by the Board as Executive Secretary from July, 1963 through July, 1965. Throughout this period, Tormey was responsible for handling the correspondence of the Board. Defendant Dalton was employed since 1955 as an assistant attorney general for the State of Wisconsin. Dalton acted as counsel to the Board from June, 1968 through 1970. The Board is responsible for licensing physicians in Wisconsin. It also regularly corresponds with licensing authorities of other states regarding either applicants before the Board or applicants seeking licensure in another state who have some connection to the Wisconsin Board. This suit concerns correspondence by the Board or by Tormey to Illinois licensing authorities during the time plaintiff was seeking licensure in Illinois.

In a pre-trial order entered on December 17, 1979, Judge Crabb ruled that plaintiff would be entitled to relief under 42 U.S.C. § 1983 if he proved that "defendants, acting under color of state law, and acting from motives of malice, ill will, or vindictiveness, prevented or attempted to prevent him from pursuing his profession." No. 70-C-151, Mem. Op. at 3. Judge Crabb reasoned that plaintiff's "'liberty' interest would seem to encompass having a fair chance to apply, pursue, or compete for employment opportunities without intentional, malicious interference by state officials." Mem. Op. at 3-4. But Judge Crabb warned that plaintiff would have to prove "defendants' active involvement in or distortion of the licensing procedures" of the other states. Mem. Op. at 4.

Plaintiff's case, as finally presented to the jury, concerned only incidents in 1964 and 1969. The 1964 matter involved an unsolicited letter sent by Tormey on behalf of the Board to the Illinois licensing authorities requesting information about plaintiff's attempts to be licensed in Illinois. The letter incorrectly stated that

plaintiff had been convicted of attempting to bribe a judge, when, in fact, plaintiff had been acquitted of that charge and had been convicted of the lesser charge of attempting to influence an officer of the court and to obstruct justice. According to plaintiff, when he appeared before the Illinois licensing board, the board's chairman confronted plaintiff with Tormey's letter and accused plaintiff of lying to the Illinois authorities by not disclosing his conviction for attempted bribery. Plaintiff contends that this incident severely prejudiced plaintiff's credibility before the Illinois authorities and was instrumental in denial of licensure.

Plaintiff and his son testified that they had met with Tormey some time prior to the date of this letter and had requested that Tormey stop stating that plaintiff had been convicted of attempted bribery. Tormey testified that the mistake was inadvertent—that he did not understand or appreciate the legal distinction between attempt to bribe a judge and attempt to influence an officer of the court and to obstruct justice. There also was testimony that, after being confronted with Tormey's inaccurate letter, plaintiff presented to the Illinois authorities a certified copy of a statement from the Clerk of Court stating correctly the charges of which plaintiff had been convicted.

After the denial of licensure following the 1964-65 events, plaintiff again petitioned the Medical Board of Illinois for licensure. Hearings were held in September, 1969. Shortly before the Illinois hearings, plaintiff and his son met with Tormey in Tormey's medical office to discuss the issue of an affidavit plaintiff had given to the Board in 1967.[4] At this meeting, Tormey agreed to, and

[4] The affidavit stated that if plaintiff were granted a Wisconsin medical license, "the same will be used merely for the purpose of securing an Illinois license to practice medicine, and will be voluntarily surrendered."

Although the origin of the proposal included in the affidavit was and still is hotly disputed, the Board based its 1967 recommendation of licensure denial in large part upon the unethical nature of the idea propounded by the affidavit. The Illinois authorities subsequently became equally concerned about the propriety of this affidavit.

did, execute a letter dated September 19, 1969 to the Medical Board of Illinois stating, *inter alia*, that the Board, not plaintiff, had first suggested that plaintiff file the affidavit promising not to practice in Wisconsin if a Wisconsin license were issued and used for purposes of securing an Illinois license. Tormey gave the letter to plaintiff for plaintiff's use in the following week's Illinois hearings.

Before those hearings were held, however, Tormey reconsidered his statement regarding the origin of the affidavit idea and concluded that, in fact, plaintiff, not the Board, was responsible for the affidavit idea. Tormey consulted with Dalton, legal counsel to the Board, regarding the proper way of correcting the error contained in the first Tormey letter. Tormey and Dalton agreed that a second letter to the Illinois authorities correctly stating Tormey's view of the 1967 affidavit incident was necessary.[5] Consequently, Tormey prepared a second letter stating that the affidavit idea originated with plaintiff or plaintiff's attorney.[6] This letter, dated September 24, 1969, was sent directly to the Medical Board of Illinois. Plaintiff never received a copy of the letter and was never informed of the corrections made by Tormey until confronted with the letter by the Illinois authorities after plaintiff had tendered the first Tormey letter. Plaintiff again claims that his credibility before the Illinois authorities was severely prejudiced and that he again was denied an Illinois license in large part because of this incident.

The case was submitted to the jury with seven special interrogatories. Interrogatories 1 and 2 asked whether

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[5] Dalton's role in preparing this letter is the primary link between Dalton and any alleged deprivation of plaintiff's constitutional rights. The testimony regarding Dalton's role was contradictory and hotly disputed. But, because of our disposition of this case on the legal questions presented, we need not discuss or decide the specifics of Dalton's role. We assume for purposes of this opinion that Dalton actively assisted Tormey in the preparation of a second letter.

[6] Tormey also offered his personal opinion that plaintiff had offered the affidavit without any intent to deceive the Board.

Tormey had violated plaintiff's constitutional right to obtain a fair hearing in Illinois by sending the 1964 letter misstating plaintiff's convictions, and, if so, whether Tormey acted in bad faith or without a reasonable belief that his act was constitutional. The jury concluded that the 1964 letter did not violate plaintiff's rights and, consequently, did not reach the question of Tormey's good faith.

Interrogatories 3 through 7 asked whether the sending of the second 1969 letter violated plaintiff's right to obtain a fair hearing, whether Dalton participated in the drafting of this letter, and whether Dalton or Tormey acted in bad faith or without a reasonable belief that his act was constitutional. The jury answered all five interrogatories in the affirmative, concluding that plaintiff's rights had been violated.

On January 10, 1980, Judge Crabb issued an Opinion and Order granting defendants' motion for judgment notwithstanding the verdict with respect to the 1969 incident. Judge Crabb reasoned that plaintiff's evidence failed to establish the prerequisites of the constitutional theory set forth in the pretrial order, and that, as a matter of law, that constitutional theory was erroneous. Plaintiff appealed to this Court.

II

Plaintiff urges upon this Court the legal theory of the district court's pretrial order—that plaintiff has a "liberty" interest in "having a fair chance to apply, pursue, or compete for employment opportunities without intentional, malicious interference by state officials." Mem. Op. at 3-4. Plaintiff also accepts the district court's reasoning that for plaintiff to prevail on this theory he must prove "defendants' active involvement in or distortion of the licensing procedures" of Illinois. Mem. Op. at 4. With regard to the facts of this case, plaintiff argues that Tormey and Dalton violated plaintiff's constitutional rights by intentionally supplying damaging, false information to the Illinois licensing authorities. Plaintiff asserts that the information denied plaintiff a fair hearing in Illinois and was instrumental in the denial of plaintiff's application for licensure.

We acknowledge that plaintiff has a protected liberty interest in pursuing his profession and that Illinois cannot, on an arbitrary or procedurally unfair basis, prohibit him from practicing his profession. *See Willner v. Committee on Character*, 373 U.S. 96, 102 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). Consequently, if plaintiff can establish that defendants, under the color of law, have interfered with that right and are not protected by qualified immunity, he has established a claim cognizable under 42 U.S.C. § 1983.

To determine whether plaintiff has established any deprivation of his constitutional rights, we must analyze carefully the exact nature of the right asserted and the alleged interference with that right by defendants.

A

First, there is no allegation that the Illinois authorities denied plaintiff a fair hearing on his application for licensure. Abundant and uncontradicted evidence established that plaintiff was afforded extensive opportunities to be heard, to present witnesses and documentary evidence, and to appeal any adverse decision.[7] The record shows that plaintiff repeatedly met, either formally or informally, with the Illinois licensing authorities, often discussing plaintiff's criminal convictions or the origin and nature of the 1967 affidavit. Even assuming the Wisconsin authorities provided the Illinois authorities with false information about plaintiff, it is clear that the Illinois authorities granted plaintiff a full opportunity to refute it. In addition, plaintiff does not contend that the refusal of the Illinois authorities to grant him a medical license was arbitrary or erroneous. Consequently, we hold that there was no foreclosure by any Illinois authorities of plaintiff's rights to procedural due process.

[7] Plaintiff did not appeal either denial of licensure by the Medical Board of Illinois.

B

The second possible theory for plaintiff is that defendants took such an active role in the Illinois proceedings that their actions interfered unconstitutionally with plaintiff's right to obtain a fair hearing before the Illinois licensing authorities. But, we agree with that portion of the district court's opinion holding that plaintiff had failed to prove defendants' *active involvement in or distortion of* the Illinois proceedings. The record simply does not establish anything more than that the defendants provided allegedly false information to the Illinois authorities responsible for providing plaintiff with a fair hearing on his application for licensure. It would be a significantly different case if there were some evidence of collusion, conspiracy, or agreement between the government officials involved.[8] Lacking such evidence in this case, we must conclude that plaintiff failed to establish any constitutional deprivation as a result of defendants' limited involvement in the Illinois proceedings.

C

The remaining issue is whether plaintiff has established a denial of any constitutionally protected liberty interest by proof that defendant officials knowingly and maliciously supplied damaging false information about plaintiff to the authorities of another government entity that was considering plaintiff's application for professional licensure.[9] The question is whether plaintiff

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[8] We believe it is unnecessary and inappropriate for this Court to resolve the difficult question of whether a claim could be established under 42 U.S.C. § 1983 by a showing that an official of one state or government entity took such an active role in the proceedings of a second state or entity, short of collusion, conspiracy, or agreement, that the official could be guilty of denying an individual his constitutional right to a fair hearing before the second entity. The facts of this case simply do not require us to reach that weighty question, and we reserve it for another day.

[9] We assume for purposes of this discussion that defendants did maliciously or in bad faith provide false information about

(Footnote continued on following page)

has established a claim for deprivation of a protected liberty interest or merely has stated a traditional common-law claim for defamation. Stated in this manner, plaintiff's case falls clearly in line with the cases developing from *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Paul v. Davis*, 424 U.S. 693 (1976).

In *Roth*, although the Supreme Court did not find that there had been any violation of the plaintiff's constitutional rights,[10] the Court set forth, in general terms, the circumstances where defamatory statements by public officials may implicate protected liberty interests. The Court set forth the rudiments of the "stigma plus" test—that where, in the process of terminating or refusing to rehire a public official, the state makes "any charge against him that might seriously damage his standing and associations in the community." 408 U.S. at 573, due process requires that the individual be afforded an opportunity to refute the charge. Charges that might implicate a person's "good name, reputation, honor, or integrity" would include charges such as "that he had been guilty of dishonesty, or immorality." *Id.*

The scope and limitations of the "stigma plus" test were clarified in *Paul v. Davis*, 424 U.S. 693 (1976).[11]

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[9] *continued*
plaintiff to the Illinois authorities. But, we believe there are very serious questions whether plaintiff, in fact, did prove either falsity or maliciousness.

[10] In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court held that a state's refusal to rehire a non-tenured faculty member without providing him with a hearing or an explanation of reasons was permissible. In *Roth*, the terminated faculty member had no property interest in continued employment at the expiration of his one-year contract, and the state officials, in refusing to re-hire plaintiff, had not "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573.

[11] In *Paul v. Davis*, 424 U.S. 693 (1976), a photograph of the plaintiff, bearing his name, was included on a printed flyer of so-called "active shoplifters" and was circulated by two chiefs of police to Louisville, Kentucky merchants during the Christmas

(Footnote continued on following page)

The question presented to the Court was whether the officials' defamation of plaintiff, "standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment." 424 U.S. at 694. The Court concluded that damage to one's reputation alone, even though inflicted by public officials, failed to implicate a protected liberty interest. The Court stated:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

424 U.S. at 701.

This Court has applied the "stigma plus" test of *Roth* and *Paul v. Davis* in two recent decisions. *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977); *Elbert v. Board of Ed.*, 630 F.2d 509 (7th Cir. 1980), *cert. filed*, No. 80-1312 (Feb. 4, 1981). In *Colaizzi*, the court held that plaintiffs had stated a claim under § 1983 where they alleged that in connection with their dismissals from state employment, state officials made defamatory public statements charging plaintiffs

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[11] *continued*
shopping season. In fact, the plaintiff had been arrested for, but not convicted of, shoplifting. After the charge giving rise to his inclusion on the flyer had been dismissed, plaintiff brought a § 1983 action against the police chiefs, alleging that the stain on his reputation resulting from the circulation of the flyer had deprived him of liberty without due process of law. The Supreme Court held that he failed to state a claim for deprivation of any constitutionally protected liberty interest.

with reprehensible conduct. The court read *Paul v. Davis* to mean that "stigma to one's reputation, inflicted by the state, is not of itself a deprivation of liberty within the meaning of the Fourteenth Amendment." 542 F.2d at 973. But, the court reasoned that:

> stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. § 1983 for deprivation of a Fourteenth Amendment liberty interest without due process.

Id. (emphasis in original). Since there was stigma plus discharge by the state authorities, we held that plaintiffs had stated a claim for deprivation of a protected liberty interest.

Finally, in *Elbert v. Board of Ed.*, 630 F.2d 509 (7th Cir. 1980), the court refused to find that the "stigma plus" test had been satisfied where, although a defamatory statement had been made by school board officials in connection with the public announcement that the plaintiff would be terminated at the conclusion of the school year, plaintiff later was rehired and was never terminated. The court reasoned that since no loss of employment ever occurred, the defamation was not accompanied by the requisite loss of a government employment, right, or privilege. Consequently, plaintiff's allegations constituted nothing more than a claim of common law defamation by state officials. And, the court stated that "[d]efamatory publications by a state official, however seriously they may harm someone, do not deprive that person of any liberty interests protected by the due process clause." 630 F.2d at 512, citing *Paul v. Davis*, 424 U.S. at 712.

We must now apply the "stigma plus" test as developed in this line of cases to the facts of this case. Even if we assume that plaintiff has proved a "stigma" as a result of defendants' correspondence with Illinois authorities incorrectly characterizing plaintiff's criminal

convictions and falsely accusing plaintiff of originating the affidavit idea, the "stigma *plus*" test is not satisfied. Plaintiff has failed to prove that these defendants were connected with any denial of a government benefit or privilege, i.e. licensure. The affiliation between stigma and denial of a government benefit is absent. Although defendants' actions may have imposed a stigma on plaintiff's reputation, plaintiff's claim fails to establish that defendants' defamation was "*in conjunction*" with the denials of licensure in Illinois. The Illinois authorities and the Illinois denials of licensure were separate and distinct from any defamatory statements made by these Wisconsin officials.

Consequently, plaintiff's claim is reduced to an allegation that these defendants made defamatory statements about plaintiff to the Illinois licensing authorities. But, as the Supreme Court in *Paul v. Davis* and this court in *Elbert* held, defamatory statements by public officials, standing alone, are insufficient to state a claim under § 1983. We acknowledge again that "§ 1983 is not, and should not become, a general federal tort law." *Elbert*, 630 F.2d at 513. The district court's grant of judgment to defendants notwithstanding the verdict was appropriate.[12]

III

For the foregoing reasons, the judgment below is

AFFIRMED.

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[12] Both parties have presented additional issues regarding jury instructions, discovery issues, the application of qualified immunity, and the *res judicata* effect to be given to state court determinations. In light of our discussion of this case on its merits, and our conclusion that plaintiff does not have a claim under 42 U.S.C. § 1983, there is no reason for this Court to address these issues.

CUDAHY, *Circuit Judge*, Concurring: I concur in the reasoning and result of the majority opinion except to the extent that it may suggest that "collusion, conspiracy, or agreement between the government officials involved" would be requisite to a successful Section 1983 claim based on an "interstate" denial of a fair hearing. Where numerous officials in several states are pursuing a virtually joint inquiry into the same questions of the professional qualifications of a particular individual, state boundaries need not provide a shield against constitutional tort liability. The instant case fails essentially for lack of evidence.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v.

DR. THOMAS W. TORMEY, JR., individually and as a member of the Wisconsin State Board of Medical Examiners; and LEROY L. DALTON, individually and as counsel to the Wisconsin State Board of Medical Examiners,

Defendants.

OPINION AND ORDER

70-C-151

This civil action for money damages was tried to a jury on the issue of liability only. A special verdict was returned, with the jury finding for plaintiff on five of the seven special verdict questions. Defendants have renewed their motions for directed verdict made at the close of plaintiff's case and at the end of the trial and have moved for judgment notwithstanding the verdict. Additionally and alternatively, defendants have moved for a new trial.

The motion for judgment notwithstanding the verdict will be granted with respect to special

verdict questions 3 through 7. I am satisfied that, no matter how favorably it is viewed, the evidence in this case can not support the conclusion that the defendants violated any constitutional right of plaintiff. Furthermore, I am persuaded that defendants' motion for a directed verdict made at the close of plaintiff's case should have been granted in all respects and that this case should not have been submitted to the jury.

The initial and persistent problem in the trial of this case has been to try to analyze the precise nature of plaintiff's claim, that certain employees and officials of the State of Wisconsin Board of Medical Examiners violated his constitutional right to pursue his profession and apply for medical licensure in states other than Wisconsin by disseminating false information about plaintiff to the medical licensing boards of other states. In an order entered just prior to the start of trial, I noted that, at no time in the protracted history of this litigation had any court focused its attention upon plaintiff's claim. I stated that I was persuaded that there could be a constitutional claim based upon interference with one's right to pursue a profession, but that I was at least tentatively of the opinion that such interference would have to involve something more than the dissemination of information; that I did not know what the showing might be but that "it would seem that it would have to include a showing of defendants' active involvement in or distortion of the licensing procedures" of the other states. At the time, I thought it unlikely that there would ever be a situation which would fit the hypothetical; that is, where the officials of one state could ever be in a position to control or

distort the licensing procedures of another state, but I thought that, particularly in view of the number of years in which plaintiff has pursued this lawsuit, he should have the fullest possible opportunity to try to show a nexus between some act of the defendants and a constitutional wrong to himself.

Upon continued reflection I am even less sure that there is any substance to plaintiff's claim that the officials of one state could be found to have violated an individual's liberty interest in pursuing his or her profession in another state.[1] Stated in the abstract it sounds plausible; it becomes less so when one tries to hypothesize activities which would constitute such a direct interference as to amount to a constitutional violation and which would also be taken under color of state law.

As I noted, it is clear that something more must be alleged than the mere dissemination of false and degrading information about the individual. Dissemination alone would amount to no more than a state law claim for defamation, unless it were accompanied by the alteration or extinguishment of a right or status previously enjoyed by the person allegedly defamed. Paul v. Davis, 424 U.S. 493, 711-712 (1976).

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1. It is clear that there is such a liberty interest, at least to the extent that the state is prohibited from excluding persons from the practice of a profession on an arbitrary or procedurally unfair basis. See, e.g., Wilner v. Committee on Character, 373 U.S. 96 (1963); Schware v. Board of Bar Exam'rs, 353 U.S. 232 (1957). See, also, Tribe, American Constitutional Law, 511-543, 948-953 (1978).

Possibly, it would constitute an actionable violation of plaintiff's constitutional rights if the defendants had procured false testimony which was introduced at a hearing held in another state on plaintiff's licensure application, or if they had threatened witnesses, or physically disrupted the actual hearing. However, nothing of this sort was alleged in plaintiff's complaint or proven at the trial.

In fact, despite the nine years which he had for preparation of this case, plaintiff was able to prove little or nothing about anything. On the eve of trial he abandoned claims relating to events in the state of New Jersey; during the trial, he had to abandon any claims relating to acts in the state of Michigan; and he had no proof of any substance on his claims relating to the state of Iowa and to defendant Pressentin and those claims did not withstand a motion for directed verdict made at the close of his case.

The evidence relating to the only two surviving claims concerning events in the state of Illinois was minimal at best.

Distilled, it consists of the following:

In 1964, at a time when plaintiff's Wisconsin medical license had been revoked following his conviction of and imprisonment for the crimes of violation of the Internal Revenue Code, obstruction of justice, endeavoring to corruptly influence an officer of a court of the United States, and communicating with a juror, plaintiff applied for a medical license in the state of Illinois which would enable him to accept an Illinois state hospital position which had been offered to him. In connection with

plaintiff's application, defendant Tormey wrote to the Director of the Department of Registration and Education of the State of Illinois, ostensibly on plaintiff's behalf, seeking information from the State of Illinois concerning plaintiff's chances of obtaining licensure in that state without having had his State of Wisconsin medical license reinstated. In that letter, defendant Tormey used the phrase "bribe a judge," to describe one of the offenses for which plaintiff had been convicted and which had been the basis for the revocation of his Wisconsin license. Technically, the use of the word, "bribe," was incorrect, because plaintiff had been acquitted of the charge of attempting to bribe a judge and had been convicted of endeavoring to corruptly influence an officer of the court. In fact, as plaintiff testified the conviction was based on the same set of facts as was the charge of bribery on which plaintiff was acquitted.

Both plaintiff and his son testified that this letter affected plaintiff's credibility in the eyes of the Illinois officials. (The letter appears as Attachment A to this opinion.)

Also, plaintiff offered evidence to prove that in 1969, plaintiff and his son, Perry, came to see defendant Tormey at his office to ask him to write a letter to the Illinois Medical Examining Committee on plaintiff's behalf. Plaintiff explained that the need was urgent because he was appearing before the board the next week, and that he wanted a letter explaining that the "affidavit idea" had not originated with him. The "affidavit idea" referred to an affidavit prepared by plaintiff's counsel sometime in July, 1967, and signed by plaintiff on July 12, 1967, in which plaintiff averred that if he were to have

his Wisconsin medical license reinstated, he would apply immediately for an Illinois license, and would return the Wisconsin license to the board as soon as he had obtained an Illinois license.

At the 1969 meeting with the Margoleses, defendant Tormey agreed to write a letter for plaintiff to take with him to Illinois. Since it was late in the afternoon at the end of the week, defendant Tormey wrote out the letter in longhand, had it typed on his business stationery and gave it to the Margoleses to take with them. (This letter is reproduced as Attachment B.) The following week, defendant Tormey had second thoughts about the letter and consulted with the Board's counsel, defendant Dalton. On September 24, 1969, five days after writing the first letter and giving it to the Margoleses, defendant Tormey wrote a second letter, with defendant Dalton's help, to the Illinois Medical Examining Committee, revising the statements of his earlier letter with respect to the origin of the "affidavit idea." (This letter is reproduced as Attachment C.)

Enclosed with the letter to the Committee were a copy of a letter sent to the Circuit Court of Milwaukee County on August 1, 1967, by defendant Tormey as Secretary of the State Board of Medical Examiners, recommending against restoration of plaintiff's medical license, and a copy of the affidavit signed by plaintiff.

In deposition testimony read into the record by plaintiff, Kenneth Schnepp, chairman of the Medical Examining Committee of the State of Illinois from 1967 to 1974, testified that the Illinois committee was aware of plaintiff's 1967 affidavit, that the Committee

considered the affidavit matter in a number of meetings with plaintiff; that the conflicting information which was received at different times made it difficult "to get at the facts," that the committee discussed the two September letters from defendant Tormey with plaintiff in several meetings, and that they based their denials of licensure on a number of factors, including the "affidavit idea."

In his opinion and order on defendants' first motion for summary judgment entered herein on July 25, 1975, the Honorable Robert D. Morgan held that the doctrine of res judicata precluded relitigation of issues raised before the Medical Examining Board in 1965, 1967, or 1969, all of which had been the subject of an appeal by plaintiff to the Supreme Court of the State of Wisconsin and discussed by that court in its opinion in Margoles v. State Board of Medical Examiners, 47 Wis. 2d 499 (1970). Among the issues listed by Judge Morgan was plaintiff's claim that the Board had misinterpreted a suggested that plaintiff wanted a Wisconsin license only for the purpose of obtaining a license in Illinois and was willing to surrender the Wisconsin license after the Illinois one had been granted.

In groping for a plausible constitutional deprivation on which plaintiff's case might proceed, I suggested that, if the defendants could be shown to have disseminated false and degrading statements about plaintiff, knowing such statements to be false and intending by their acts to interfere with plaintiff's opportunity for a fair hearing in another state, and if those false statements could be shown to have precluded plaintiff from obtaining a fair hearing in

another state, not merely because the information was false, but because by the manner and timing of its transmittal plaintiff was caught off-guard and unprepared to respond to the information and somehow deprived of a fair opportunity to make his request for relicensure, then plaintiff might have a claim for a violation of his constitutional right to a fair hearing on an application for a professional license.

As the formulator of this theory of a constitutional wrong, I can say now that I believe it is completely without merit. As defendants' counsel attempted to point out, there is nothing inherently unconstitutional in the sending of a contradictory letter about an applicant to a licensing board or even in writing and sending a false and defamatory letter about the applicant. It is a distortion to try to make it such by adding on to it the element of intention to violate a constitutional right. The proper question is whether the defendant performed some unconstitutional act intentionally; that is, non-negligently; not whether the defendant performed an act otherwise constitutional with a malicious intent which made the act unconstitutional. Had this distinction been thought through clearly, it would have been another reason not to have sent the case to the jury.

Additionally, the theory, as I proposed it, is meaningless without a clear idea of what is meant by a "fair hearing." Without instruction on this point, the jury could not have made an informed decision on special verdict questions 3 and 6.

In any event, even if there were some substance to the theory as formulated, plaintiff did not prove the facts necessary to support the claim.

In the first place, it is a matter of law that there was nothing false about the statements in defendant Tormey's September 24th letter concerning plaintiff's affidavit. The truth or falsity of the origin of the "affidavit idea" was at issue in the state court proceedings initiated by plaintiff. Thus he is precluded by the principles of res judicata from relitigating that aspect of the case in this litigation.

In the second place, even if plaintiff had asserted at trial that the harm caused by the September 24th letter resulted not from its falsity, but from the conflict in the statements in the two letters,[2] there is no evidence in the record to show that the two letters kept him from receiving a fair hearing. There is nothing which would indicate that had plaintiff thought himself unreasonably prejudiced by the two conflicting letters, he could not have asked for a continuance of his hearing, that he could not have asked for an adversarial hearing, or that he could not have called witnesses in his behalf to rebut any implication of wrongdoing in defendant Tormey's letter.

In answering "no" to special verdict question no. 1, the jury found that plaintiff had not shown

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2. Plaintiff makes the assertion in his post-trial brief, but he did not make it during the course of the trial.

that defendant Tormey had used the phrase, "bribe a judge," knowing it to be false, intending to prevent plaintiff from pursuing application and that the false statement was not the substantial factor in preventing plaintiff from obtaining a fair hearing on his application for licensure.

With respect to its answer to question no. 1, the jury's verdict is sound. There was substantial credible evidence from which the jury could have found that defendant Tormey did not understand the slender distinction between a bribery conviction and a conviction for "corruptly influencing." The full contents of the letter controverted any implication that defendant Tormey was acting with intent to prevent plaintiff from obtaining relicensure. Finally, there was no credible evidence from which the jury could have found that the letter prevented plaintiff from obtaining a fair hearing.

However, with respect to the jury's answers to the last five questions of the special verdict, the verdict can not stand. With respect to these five questions, the motion for judgment notwithstanding the verdict will be granted.

Since the defendants' motion for judgment notwithstanding the verdict will be granted, there is no need to consider their alternative motion for a new trial. However, a few comments may be appropriate in the event the case is appealed and the judgment overturned.

In their post-trial brief, defendants have pointed out the prejudice which inured to them by the last-minute amendment of the witness list by plaintiff. It

is understandable that defendants Dalton and Tormey were surprised by the ruling to allow plaintiff to call them as witnesses in his case since they had not been included on the witness list submitted on October 9, 1979, pursuant to court order.[3] However, defendants did not request a continuance to permit them an opportunity to develop their defense more fully in light of the unexpected testimony. Had they done so, their request would have been granted. If a new trial must be held, presumably defendants will have ample opportunity to develop the factual evidence of what did or did not occur in Illinois and, in particular, with respect to what opportunities plaintiff had for a full and fair hearing on his application for licensure.

In his closing argument, plaintiff's counsel argued the suppression of documents by defendant Tormey as an indication of defendant Tormey's malice. I do not recall that defendants objected to this. However, I do not believe that it was proper argument, since plaintiff had not proved that defendant Tormey had withheld any documents except in compliance with the law. At a new trial, I would not allow plaintiff to pursue this line of argument unless they proved intentional and wrongful withholding of documents on defendant Tormey's part.

Finally, the trial of this case raised questions about the allocation of the burden of proof on what is

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3. It is probable that had it not been for my questioning of plaintiff's counsel at the final pretrial conference, plaintiff would not have thought to call defendants Dalton and Tormey as witnesses and would never have established the commissic of any acts of any kind by any of the defendants.

referred to as the affirmative defense of good faith.

Ordinarily, it is the defendant's burden to establish an affirmative defense. In the case of the good faith defense for government officials, however, placing the burden of proof on the defendant seems unworkable and unwarranted: unworkable, because as a practical matter, it is almost impossible to prove the lack of a subjective malicious intention to violate another's constitutional rights or the lack of an objective legal standard of behavior; and unwarranted, because the concept of a qualified immunity for government officials stems from concern that such persons be permitted to function reasonably free from fear that the exercise of discretion will subject them to liability. See, discussion in Cruz v. Beto, 603 F.2d 1178, 1182-1184 (5th Cir. 1979).

I believe that, in a suit against governmental officials brought pursuant to Title 42 of the United States Code, the plaintiff should bear the burden of proving by the preponderance of the credible evidence that the defendants did not act in good faith, assuming, of course, that defendants have raised the defense.

ORDER

IT IS ORDERED that defendants' motion for judgment notwithstanding the verdict is GRANTED with respect to questions 3 through 7 of the special verdict. The Clerk of Court is directed to enter judgment on the verdict with respect to questions 1 and 2 of the special verdict and notwithstanding the verdict with respect to questions 3 through 7 for defendants and to DISMISS this case with prejudice and with costs.

Entered this 10th day of January, 1980.

BY THE COURT: Barbara B. Crabb
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 15, 1978

Before Hon. Walter J. Cummings, Circuit Judge; Hon. Robert A. Sprecher, Circuit Judge; Hon. William J. Bauer, Circuit Judge

No. 78-1354

DR. MILTON MARGOLES,

Plaintiff-Appellant,

vs.

DR. F.A. ROSS, DR. THOMAS E. HENNEY, DR. ROBERT G. ZACH, DR. G. STANLEY CUSTER, DR. JOHN J. SATORY, DR. DAVID J. TWOHIG, DR. H.G. WITHROW, DR. BENJAMIN LAWTON, and DR. THOMAS W. TORMEY, JR., individually and as members of the Wisconsin State Board of Medical Examiners; LEROY L. DALTON, individually and as counsel to the Wisconsin State Board of Medical Examiners; and DONALD PRESSENTIN, individually and as investigator for the Wisconsin State Board of Medical Examiners,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 7 C 151
Robert D. Morgan, Judge.

ORDER

This is a civil action in which the plaintiff-appellant, a physician, seeks money damages for (1) an alleged violation of his civil rights by defamation; (2) an alleged conspiracy to violate his civil rights; (3) an alleged common law slander; and (4) an alleged denial of his due process rights in the conduct of hearings on his application for license restoration. The district court granted the defendants' motion for summary judgment on all counts. For the following reasons, we reverse the lower court's judgment on Counts I and II, and affirm on Counts III and IV.

As the lower court recognized, the major issue presented by the motion for summary judgment on Counts I and II was whether the named defendants were immune from liability under S. 1983 by reason of their status as state officials. And, as the court also recognized, "the present test for immunity from liability for damages arising out of official conduct is simply whether the conduct can 'reasonably' be characterized as having been taken 'in good faith.'" More precisely, the Supreme has declared that under S. 1983

> "(a) compensatory award will be appropriate only if the (official) has acted with such an impermissible motivation or with such disregard of the (plaintiff's) clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Wood v. Strickland, 420 U.S. 308, 322 (1975). In this sense, then, the appropriate standard necessarily

contains elements of a "subjective" test, for it demands an inquiry into the defendant's motive or intent.

On this latter point, we also note that the defendant's motivation is an ultimate question of fact whose resolution depends on the circumstances of his actions as established by the evidence at trial. Askew v. Bloemker, 584 F.2d 673, 679 (1976) It is for this reason that "(c)ases in which motive and intent play a leading role are peculiarly inappropriate for disposition on a motion for summary judgment." Id. Thus, as this Court has made clear, a plaintiff is entitled to take to the jury the state-of-mind defense on which the defendants rely under S. 1983 if he has adduced "specific facts from which a reasonable man, viewing all the evidence in the light most favorable to (the plaintiff) and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting either in bad faith or unreasonably." Id.

Applying these general principles to the case at hand, we must conclude that the plaintiff has adduced facts that are sufficient to defeat a motion for summary judgment on Counts I and II. More particularly, when the evidence is viewed in the light most favorable to the plaintiff, it tends to show: (1) that Dr. Tormey sent an unsolicited letter to the Illinois licensing authority which falsely stated that the plaintiff had been found guilty of bribery; (2) that Dr. Tormey informed the Iowa Medical Board and a Michigan physician that the plaintiff had been accused of conducting illegal abortions, knowing that the Wisconsin Medical Board had filed a report showing the charge

to be groundless; (3) that the Assistant Attorney General Dalton stated that he "would go to any lengths to prevent Dr. Margoles from practicing again"; (4) that Dalton wrote a letter to the counsel for the Michigan Medical Board which falsely stated that the plaintiff had been convicted of "attempted bribery"; (5) that Dalton failed to inform the licensing boards of other states that there was evidence which exonerated the plaintiff of certain charged wrongdoings; and (6) that the investigator Pressentin failed to disclose the existence of his investigation report exonerating the plaintiff of the abortion charges at the 1965 hearing in which the plaintiff sought reinstatement of his Wisconsin license. When the inferences most favorable to the plaintiff are drawn from this and other evidence, a jury might reasonably conclude that the defendants had acted maliciously. We therefore reverse the district court's grant of summary judgment on Counts I and II.

By contrast, however, we find that, as a matter of law, the defendant Ross cannot be held liable for money damages for the alleged slander of the plaintiff. In Barr v. Mateo, 360 U.S. 564 (1958), the Supreme Court declared that, in an action for common law defamation against a public official, the fact that the official was acting "within the outer perimeter of (his) line of duty is enough to render the (immunity) privilege applicable, despite the allegations of malice in the complaint...." Id. at 575 (emphasis supplied). The central question under Count III, then, is not whether Dr. Ross was acting in good faith, but rather, whether he was acting "within the outer perimeter of (his) line of duty." And it is quite clear to us that when the chairman of a state medical board grants a requested interview to a

reporter to discuss matters that had been before the board, he is indeed acting within the limits of his line of duty. We therefore affirm the lower court's grant of summary judgment on Count III.

Finally, we also affirm the lower court's grant of summary judgment on Count IV on the grounds of res judicata. The constitutional validity of the plaintiff's 1969 hearing was the subject of the Wisconsin Supreme Court's decision in Margoles v. State Board of Medical Examiners, 47 Wis. 2d 499 (1970), and the 1965 hearing was appealed only to the Wisconsin circuit court. In both cases, then, there was a final decision and res judicata therefore applies.

For these reasons, the judgment of the district court is AFFIRMED IN PART AND REVERSED IN PART.

September 7, 1978

On Petition for Rehearing

Order

On petition for rehearing, the Attorney General for the State of Wisconsin correctly notes that the order in this case appears to reinstate all defendants as to Counts I and II. On reconsideration, therefore, the original order is amended as follows:

1) the first two lines of Page 2 of the order are deleted;

2) substituting for the deleted material is the following:

"following reasons, we reverse the lower court's judgment on Count I as to the defendants Tormey, Dalton and Pressentin, and affirm on all other counts."

In all other respects, the petition for rehearing is hereby denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v.

DR. F. A. ROSS, etc., et al.,

Defendants.

70-C-151

DECISION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

As developed and argued to date, plaintiff's complaint seeks money damages, in what amount to four counts, for alleged violation of his civil rights by defamation and denial of due process of law, and for alleged common law slander. Jurisdiction of the civil rights causes of action was laid under 28 U.S.C. S. 1331 and 1343 (3) and 42 U.S.C. S. 1983 and 1985, and the slander cause of action rests on diversity of citizenship under 28 U.S.C. S. 1332, as well.

Through a detailed Opinion and Order filed herein on July 25, 1975 (67 F.R.D. 666), this court allowed motions for summary judgment in favor of all defendants on the conspiracy count (Second Cause of Action, S. 1985) and on the due process count (Fourth Cause), and allowed such motions in favor of nine defendants on the so-called First Cause of Action; but denied summary judgment to defendants Dalton and Tormey on that count, and to defendant Ross on the slander court (Third Cause).

Subsequently, after scheduled trial had been delayed at plaintiff's request, the remaining defendants filed a second motion for summary judgment, which has been dealt with in a Report and Recommendation and an Amendment to Report and Recommendation issued to the parties and to this judge, after briefing and argument before her, by United States Magistrate Barbara B. Crabb. The court hereby adopts the conclusion of said magistrate that filing and consideration of the second motion for summary judgment is appropriate.

Since the 1975 decision herein, the United States Court of Appeals for the Seventh Circuit has decided Beard v. Robinson, 563 F.2d 331 (7th Cir., 1977), which clearly holds that the applicable state statute of limitations in a federal civil rights (S. 1983) case is the limitation on "all civil actions not otherwise provided for," rather than the limitation governing the closest analogous state tort action. Because this court in its earlier decision on the first cause of action applied the two-year Wisconsin libel and slander limitation, and because Beard requires the six-year Wisconsin limitation applicable to an action "when a different limitation is not prescribed by law," review of the prior decision is required to determine

the extent to which application of the shorter statute of limitations may have contributed to the orders previously entered.[1] That such orders are still subject to any necessary correction in this court now is clear under Rule 54(b), Federal Rules of Civil Procedure, because there was no express direction for the entry of any judgment in the Opinion and Order of July 25, 1975. Accordingly, the period involved on Count I reaches back to June 11, 1964, rather than to June 11, 1968, as heretofore held.

In responding to this second motion by defendants for summary judgment, having changed counsel at least a second time, plaintiff now asserts that the "findings and opinion" in the 1975 Opinion and Order "are, unfortunately, confusing and in some respects contradictory." He also claims error in some of the facts there stated to be uncrontroverted. To the extent that these comments may be valid, relief should be provided.

It was not the court's intention in 1975 to make "findings," in the sense that it decided issues of fact, whether material or not; but, in keeping with the letter and spirit of Rule 56(e), F.R.Civ.P., it was attempting to state a factual background on which no substantial dispute appeared to exist in the very substantial record of briefs, affidavits, and discovery materials, much of which is conclusory allegation, or opinion, or argument, and some of which is competent and relevant sworn testimony.

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1. The two-year Wisconsin statute of limitations on libel and slander actions is still applicable to the common law slander action against defendant Ross.

There is no value here in disputation over semantics or over immaterial matters. Care was taken in gleaning the "Uncontroverted Facts" in 1975, and the court is not willing to abandon those now on any unspecified basis. It is perfectly clear, of course, that the court did then find, and state, triable issues with respect to defendants Tormey and Dalton on the first cause of action, and with respect to defendant Ross on the third.

As ordered in 1975, and in keeping with the mandate of the last sentence of Rule 56(d), F.R. Civ. P., the "Uncontroverted Facts" are to be deemed essentially established at any necessary trial herein; but that need not preclude proof of any relevant contacts by defendant Dalton with persons in states other than Michigan, if, in fact, there were such. No other supposed inaccuracies in the "Uncontroverted Facts" are perceived.

It is also urged that the 1975 ruling granting defendants summary judgment on the fourth count, through application of the doctrine of res judicata, should be reconsidered and reversed. The court is not willing to do that, in the firm belief that the conclusion reached in 1975 is sound and that to reverse it would be error.

THE QUESTION OF IMMUNITY

The defendants' motion now under consideration rests heavily on the doctrine of immunity of public officials to civil damage suits. While that doctrine was advanced and argued on the prior motion in 1975, the point was not addressed by this court in any way in its Opinion and Order. It can only be supposed that it was overlooked in the number and complexity of the

decisions there taken. In any event, there could be no justification for not passing upon it now. Judicial oversight, like application of the wrong statute of limitations, is surely subject to correction before a judgment has become final.

There is no dispute over the facts that, at times here pertinent, defendant Ross was President and a member of the Wisconsin State Board of Medical Examiners; defendant Tormey was a member and Executive Secretary of that Board; and defendant Dalton was an Assistant Attorney General of the State of Wisconsin, assigned as legal counsel to the Board.[2] All are sued "individually and as members of (or counsel to or investigator for) the Wisconsin Board of Medical Examiners," and the allegations against them charge things done or said in their respective official capacities.

THE TEST FOR OFFICIAL IMMUNITY

An immunity of public officials to civil damage suits is ancient in the common law. In holding a judge exempt from liability in a civil action for acts done in the exercise of his official function, the Supreme Court, in 1871, speaking through Mr. Justice Field, said:

"This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608 (12 Coke

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2. Donald Pressentin, an original defendant, was an investigator for the Wisconsin Board of Medical Examiners up to December 31, 1965. He was dismissed from the case by the 1975 order because of the statute of limitations then considered applicable. Any wrongful action on his part between June 11, 1965 and his leaving the board might be actionable.

25), where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continued columniations.'" (Bradley v. Fisher, (13 Wall.) 80 U.S. 335 at p. 347 (1871).

In Barr v. Mateo, 360 U.S. 564 (1959), the Court, speaking through Mr. Justice Harlan, began its Opinion, saying:

"We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict -- on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities."

The Court in Barr sustained the immunity of a federal rent control official against liability in a defamation action, saying at page 572:

"The privilege is not a badge or emolument of exalted office, but an expansion of a policy designed to aid in the effective functioning of

government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and re-delegation of authority as to many functions, and we cannot say that these functions become less important because they are exercised by officers of lower rank in the executive hierarchy.

* * * *

(p. 575) The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, * * *."

In Scheuer v. Rhodes, 416 U.S. 232 (1974), Chief Justice Burger, speaking for a unanimous court (except for Mr. Justice Douglas, who took no part), reversed dismissal of suits under 42 U.S.C. S. 1983 by personal representatives of students killed by gunfire on the Kent State University campus. The suits were brought against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted men, and the University president. The trial court had dismissed the action as in effect against the State of Ohio and thus barred by the Eleventh Amendment, and the Court of Appeals had affirmed on the alternative ground of the common law doctrine of absolute executive immunity. The Court held the Eleventh Amendment no bar to suits against individuals, and the immunity of public officials "not absolute." The opinion observed, starting at p. 249:

"These cases in their present posture present no occasion for a definitive exploration of the scope of immunity available to state executive officials * * *. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. * * *Further proceedings, either by way of summary judgment or by trial on the merits is required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint."

In Wood v. Strickland, 420 U.S. 308 (1975), the Supreme Court of the United States again addressed the matter of official immunity in the context of the members and administrators of an Arkansas school board being sued under S. 1983 by students claiming infringement of their constitutional rights by expulsion from school. A court of appeals' judgment sending the case back to the district court for a new trial was vacated and the case was remanded to the appeals court for determination of a question involving alleged procedural due process; but on the question of the extent of the qualified immunity of the public officials involved, the Court, speaking through Mr. Justice White, said, in concluding Part II of the opinion, at page 322:

"A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the students' clearly established constitutional rights that his action cannot reasonably be characterized as

being in good faith."

In that case (Wood v. Strickland, supra), four justices, who concurred in the judgment and all other parts of the opinion, felt it necessary to, as they said, "dissent from Part II which appears to impose a higher standard of care upon public school officials, sued under S. 1983, than that heretofore required of any other official."

It would thus appear that the present test for immunity from liability for damages arising out of official conduct is simply whether the conduct can "reasonably" be characterized as having been taken "in good faith." The objective facts and subjective motivations[3] must be looked at in each case to make that determination, and four of the nine justices of the Supreme Court of the United States believe that this statement of the test understates, in general, the degree of immunity which is appropriate for public officials, at all levels of public responsibility, in the performance of their duties.

Plaintiff, in his brief, appears to agree with this statement of the test, arguing only that defendants are shown to have been guilty of bad faith, or that there are genuine issues of fact on that question.

That the question is essentially one of law, determinable on motion for summary judgment, is expressly recognized in Scheur, supra.

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3. In Wood, at p. 321, the opinion says that the proper test contains both objective and subjective elements.

THE TEST APPLIED

While not really dealing with the question of immunity, the magistrate's procedure, on this second motion for summary judgment, involved under a local rule or practice, a set of proposed "Findings of Fact" by the movants (defendants), objections thereto by plaintiff, and evaluation of the proposals and objections against the record by the magistrate, with aid of argument from the parties, in the process of deciding whether, in fact, any genuine issues of material fact do exist. That process resulted in proposed findings of fact by the magistrate in the Report and Recommendation, as amended, referred to above. Those recommended findings have been specifically commented upon by the parties. Those proposals, and the magistrate's justifications therefor, along with subsequent comments of the parties thereon, are of immense help in applying the test for official immunity in relation to the motion under consideration.

Of course, pursuant to prior order of court, the magistrate applied the two-year statute of limitations in certain considerations, and those considerations require specific review.

With respect to defendant Tormey, the magistrate proposes a finding that "he has never conveyed false information" since June 11, 1968 (the two-year cutoff date), recognizing an earlier letter containing a misstatement that plaintiff had been found guilty of attempting to bribe a judge. Running this point out reveals that one or more of the letters which plaintiff complains about were dated prior to June 11, 1964,

outside the six-year limitations' period,[4] and that factual correction was indisputably issued when the error was called to Dr. Tormey's attention. Even more important, however, the overall circumstances of plaintiff's real adventures with the criminal law clearly justify misunderstanding of the legal technicalities on the part of Dr. Tormey, and provide no basis whatsoever to question his good faith to any degree or in any way.

The change in applicable statute of limitations does not appear to have affected the magistrate's considerations with respect to defendants Dalton and Ross. The magistrate did not consider any problem with former defendant Pressentin, who had been dismissed out of the case wholly on the basis of the statute of limitations. As noted above, any showing of "bad faith" action with respect to plaintiff between June 11, 1964, and his departure from the Board on December 31, 1965, might be actionable through the first count, if outside such immunity as his position might involve. None such, however, has been called to the court's attention (or been found), which could reasonably be said to indicate anything but good faith performance of his official duties as investigator for the Wisconsin Board. Objective reading of minor contradictions plaintiff developed, by going back to people the Board investigators had interviewed and quoted, or paraphrased, tend in general to show objectivity and good faith rather than the contrary.

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4. One letter, apparently addressed to an Illinois official, was dated July 22, 1964, and referred to charges before the Wisconsin board.

Application of the test for official immunity, as here argued by defendants, of course, does not involve determination whether there is a genuine issue of material fact on the issue of liability in the absence of such immunity, but, rather, whether there is any evidence, sufficient as a matter of law, to permit a determination that good faith performance of public duty may reasonably be questioned. If "Yes," there is no immunity; if "No," the motion for summary judgment under consideration must be allowed by applying defendants' qualified immunity as Wisconsin public officials.

There is nothing in the magistrate's recommended findings, nor in defendants' proposed findings, to indicate a "Yes" answer to that question. It remains to examine carefully plaintiff's comments and objections for such evidence, because none is otherwise apparent to the court from the record.

Plaintiff has filed a 64-page Response to the motion, accompanied by a second volume containing (1) affidavit of one of his new lawyers stating the difficulty of getting documents authenticated in the short time since he was retained; (2) affidavit of plaintiff himself, largely consisting of a partial calendar of events in his life since 1950; (3) affidavits of Clark R. Mollenhoff, a newspaper reporter, Herbert L. Usow, a former attorney for plaintiff, and of David Zweifel, another reporter; and (4) some 27 other documents, some multi-page and otherwise subdivided, consisting of miscellaneous documents, each labeled "Pl. Ex. ___," including (a) what purport to be minutes of the Wisconsin State Board of Medical Examiners for

certain meetings in 1956, 1957, 1964, and 1968; (b) various letters signed by defendants Tormey and Dalton and others; (c) a printed report of the Board's recommendation against restoration of plaintiff's Wisconsin license in 1965-66, containing findings and conclusions, addressed to Honorable John A. Decker, Judge of the Wisconsin Circuit Court, who had revoked the license in 1962; (d) various other letters, some keyed to alleged "inaccuracies" in investigative reports to the Wisconsin Board; and (e) an opinion of a then lawyer for plaintiff on various reports of opinions expressed to investigators for the Board, etc.

Plaintiff has also filed a separate 24-page Response to Defendants' Proposed Findings of Fact and Conclusions of Law and Plaintiff's Proposed Conclusions of Law, as well as a 15-page Response to the U.S. Magistrate's Recommendations, a two-page Response to Defendants' Objections to Said Report and Recommendation, as amended, a Supplemental Brief, pursuant to leave of court, after oral argument December 15, 1977, on the subject motion, and a five-page Response to Defendants' Memorandum Brief in Reply to Plaintiff's Supplemental Brief. He has had the last word.

The court has reviewed the documents filed and all references therein to definitive material, has not been concerned about any lack of authentication of apparent evidentiary documents, and has considered all of the material before it in relation to the allegations of the complaint and plaintiff's arguments against application of the doctrine of official immunity. In over ten years, plaintiff has had a full opportunity to develop any evidence of bad faith, has apparently

devoted constant effort to doing so, and has had full opportunity to be heard. Objective consideration of all that material, individually and as a whole, does not help plaintiff on this issue.

Plaintiff and his family are, no doubt, thoroughly convinced of a "vendetta" against him by defendants and former defendants; but such feelings and suspicions, however sincere and deeply held, do not remove the defendants here from that group categorized by Mr. Justice Harlan in Barr, supra, as "responsible governmental officers," or remove plaintiff's supposed cause from the description, "vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities." (360 U.S. 564). Defendants are entitled to such immunity from harassment as the law does afford persons carrying the important public responsibility which defendants did at the times here pertinent, and bitter disapproval by persons damaged thereby, financially and otherwise, is to be expected.

Based on its consideration of the record here, this court cannot disagree with the new[5] "findings of fact" with respect to defendants Dalton and Tormey, as recommended by the magistrate; but even if the court were to make ALL of the findings in the plaintiff's "Proposed Statement of Facts," as filed on May 20, 1977 (which it is by no means willing or able to do), it is the judgment of this court that plaintiff would fail to make a case against any defendant to prevent application of the present doctrine of limited or qualified

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5. As distinguished from the "Uncontroverted Facts" in the 1975 Opinion and Order.

immunity as the public official he was.

It is clear that, in addition to asking the Board for a recommendation that his Wisconsin license be restored, plaintiff, with the help of his son Perry, organized a petition for a presidential pardon and recruited reporters to write news stories about his problems and efforts at vindication, to the general effect that, having paid his debt to society by fines and imprisonment for his felony convictions, he should be allowed to practice medicine in Wisconsin again, without mention or concern for the character qualifications required of new applicants for license so to do. A well-orchestrated campaign against the Board is quite clearly shown. Any unreasonable questioning of motives, or possible development of vendetta, would appear more reasonably chargeable to plaintiff's side of this controversy. The Wisconsin Board and its members and advisers involved here appear to have operated with reserve, fully in the open, stating their reasons for decision public; and, in the view of this court, on this record, have done so with uncommon restraint. Plaintiff has been licensed since 1966 in at least six jurisdictions, including Illinois where he resides, without any formal opposition from any defendant.

Essentially all that plaintiff and three sets of counsel have developed since the case was filed in 1970, or before, which is said to indicate any bad faith:

(1) The alleged plan to obtain a temporary Wisconsin license only as an aid in obtaining an Illinois license. The idea is said to have originated with a representative of the Wisconsin Board (not

Dalton, Tormey, Pressentin, or Ross). Plaintiff, however, did willingly participate in the plan, which was later reported against him as indicating a character flaw. No entrapment is indicated by any defendant, but a willingness of plaintiff to gain his ends by subterfuge is clearly shown.

(2) A news reporter's opinion that defendant Dalton was "hostile" to plaintiff in 1968, and another news reporter's quotation of Dalton in 1968 that "he believed it was his duty * * * that he do everything he possibly * * * could to make sure this guy does not practice medicine." It might be observed that strongly held convictions of public duty do not even suggest "bad faith," although possibly often so characterized by persons who do not agree with them.

(3) Various routine inquiries or responses involving plaintiff between the Wisconsin Board and medical boards in other states. It takes a one-track vindictive reading of this correspondence to consider it anything but objective and factual. Any other course could well have been considered malfeasance. The one exception, of course, is defendant Tormey's reference to "conviction" for bribing, or attempting to bribe, a judge, when, in fact, bribery was only a charge on which there was an acquittal, and the actual conviction was for attempting to obstruct justice. As observed above, a physician's failure to make this distinction is not surprising, and it is certainly no indication whatsoever of bad faith. On the other hand, correction of such an error upon discovery is evidence of good faith performance of public duty, as is the record in the Board minutes that defendant Tormey made a motion to recommend relicensure of plaintiff.

(4) The alleged slander committed by Dr. Ross relating to abortion, in an interview by news reporter Margaret Bauman, in late May or early June, 1968, who, incidentally, was recruited by Perry Margoles, and who also confused the obstruction of justice conviction with one for bribery. Ms. Bauman related on deposition that Dr. Ross told her plaintiff could get his license back by proving he was of good moral character. She said that when she asked, "Is he an abortionist?" Dr. Ross "kind of hemmed and hawed about it," and that "there was evidence, which he implied really wouldn't stand up in court." There is no doubt that such evidence existed, though it was disputed, somewhat discredited, and it was never acted upon. She also said she didn't recall his exact words, and she wrote a story about supposed Margoles hardships and efforts for a presidential pardon, which didn't get published and which didn't mention abortion.

(5) The court views plaintiff's arguments about alleged withholding of information favorable to plaintiff as pure "smoke" on this issue.

The 1975 decision of this court did find some genuine issues of material fact for trial, which, absent the doctrine of limited official immunity, would have justified a trial in this case. Unless that important doctrine is completely ignored, however, and unless state officials in charge of licensing physicians to treat the physical and mental ills of the public must perform their routine functions in constant danger of personal liability, without even a privilege of informal exchange of information with similar officials in other states, or a privilege of some degree of

candor with news people who are sent to them, the doctrine of immunity does protect the defendants here from this lawsuit. To hold otherwise would make impossible any degree of professional discipline, even by one's peers within the profession.

There is no doubt that the questioning by plaintiff of the good faith of defendants here, whether considered objectively, subjectively, or both, is simply not reasonable. The fact that such questioning by plaintiff exists, however strenuously, does not even tend to make it appear reasonable. It is clear that defendants believed plaintiff's conviction of felony, obviously involving moral turpitude, with no showing of, or apparent concern for showing of, any contrition, required their withholding of favorable recommendation on his demands and their discreet dissemination of facts to other medical licensing authorities. They talked conscientiously to newsmen plaintiff sent to them. They did not do more. If they had done less, that could well be a basis for questioning their performance of public duty. If acting as they did in this case could subject them to personal liability, their effective public service would be destroyed. This record clearly supports the conclusion that the doctrine of qualified immunity is applicable to all defendants with respect to this suit. There are no issues of fact for trial in that regard, and the present motion must be allowed

Accordingly, IT IS ORDERED that defendants' second motion for summary judgment is ALLOWED, and the clerk is directed to enter judgment for defendants.

Robert D. Morgan
United States District Judge

entered February 23, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v.

DR. F. A. ROSS, etc., et al.,

Defendants.

70-C-151
OPINION AND ORDER ON MOTION
FOR SUMMARY JUDGMENT

This is a civil action for money damages. Plaintiff sues in four "causes of action" for (1) the alleged violation of his civil rights by defamation, (2) an alleged conspiracy by all defendants to violate his civil rights as alleged in the first cause, (3) alleged slander by defendant Ross in an interview with a newspaper reporter, and (4) alleged denial of his right to due process of law in the conduct of hearings by the Wisconsin State Board of Medical Examiners concerning his application for restoration of license to practice medicine in Wisconsin. Jurisdiction is claimed under 28 U.S.C. S. 1331 and 1343(3) and 42 U.S.C. S. 1983 and 1985, and also under 28 U.S.C. S. 1332.

In complaint originally filed June 11, 1970, plaintiff sets forth that he was convicted of violations of the Internal Revenue Code of June 3, 1960, and was sentenced to serve one year in

prison and to pay fines of $15,000; that he was convicted on October 12, 1960, of attempting to influence an officer of the court and to obstruct justice, and was sentenced to serve five years in prison and to pay fines of $5,000 (and on the same day was acquitted of a charge of attempted bribery); that on June 6, 1961, he was convicted of a misdemeanor for communicating with a juror and was sentenced to serve six months in prison and to pay fines of $1,000; that on July 14, 1960, the Wisconsin State Board of Medical Examiners recommended revocation of his license; that on February 26, 1962, his license was revoked by the Circuit Court for Milwaukee County; that on September 15, 1962, he was released on parole; that in September, 1966, his parole expired; that he has since applied for and been granted licenses to practice medicine in Michigan, Indiana, New Jersey, California, Vermont, and the District of Columbia; and that he has applied for and been denied licenses in Iowa, Illinois, and Wisconsin, among other states. (License has been granted in Illinois since the complaint was filed.)

For his first cause of action, plaintiff alleges that defendants, or some of them, or one of them, have attempted to prevent his licensure in other states by supplying not only correct information about him, but by vigorously and aggressively supplying varying degrees and types of false information to persons and agencies requesting information about him, and to persons and agencies not requesting such information. The degrees and types of false information allegedly include the following:

1. Between March and June, 1966, defendants sent certain unsubstantiated complaints to the Iowa State Board of Medical Examiners in an attempt to induce that board to refuse plaintiff's application for a license.

2. Between March and June, 1966, defendants falsely and maliciously, in communication to the Iowa State Board of Medical Examiners, accused plaintiff of having performed illegal abortions.

3. During March, 1968, an employee of the Wisconsin State Board of Medical Examiners travelled to the State of Michigan under the direction of the defendants and interviewed potential associates and employers of plaintiff in an attempt to discourage them from employing and associating with plaintiff, and also falsified certain records and reports relating to plaintiff.

4. Between October and December, 1968, defendants made unsolicited contacts with the New Jersey Medical Board and falsely and maliciously advised that board that plaintiff was fraudulently misrepresenting his background and was unsuited for practicing medicine, all for the purpose of attempting to influence the board to rescind plaintiff's license.

5. During the period from 1964 to and including 1969, defendants sent letters to the Illinois Medical Licensing Board which were derogatory to plaintiff, and which contained false representations, in a successful attempt to preclude an Illinois license to the plaintiff.

6. Defendants willfully and maliciously misrepresented records and information for the purpose of discrediting plaintiff and preventing his licensure in certain states, precluding plaintiff's employment by persons, organizations and communities eager and willing to retain his services.

Plaintiff contends that by these utterances defendants are depriving him of his right to practice medicine and thereby of valuable property, to his damage.

For his second cause of action, plaintiff alleges that all of the defendants conspired among themselves to deprive him of the rights as set forth in the first cause of action.

For his third cause of action, plaintiff alleges that defendant Ross falsely, willfully and maliciously made a statement to a reporter for United Press International, in Milwaukee, Wisconsin, which was substantially as follows: "Dr. Margoles' attempt to secure licensure in this state is a joke." "He has been performing abortions"; that defendant Ross intended his statement to mean that plaintiff was performing illicit and unlawful abortions on women and violating his responsibility and oath as a physician and surgeon; that the person to whom the statement was made understood said words to have such meaning; that the statement was not true; and that defendant Ross knew that it was not true.

In an Amended Complaint for which leave of court was granted December 21, 1973, for his fourth cause of action plaintiff alleges that sometime after his release on parole, he petitioned the Wisconsin

State Board of Medical Examiners for reinstatement of his license; that he was granted a hearing, after which the board recommended that his license not be reinstated; that in conducting the hearing, the board and each member of the board deprived him of his right to due process of law in the following respects, among others.

1. The conclusions of the board were based upon evidence which the board and the members thereof knew was false.

2. The findings of fact and conclusions of law were contrary to evidence in the possession of the board.

3. The findings of fact and conclusions of law were based, at least in part, on evidence which was received by the board in camera, of which plaintiff was not informed and which plaintiff was not given an opportunity to rebut.

4. The findings of fact and conclusions of law were based, at least in part, on evidence which was received by the board subsequent to the closing of the hearing.

The case is now before the court on defendants' motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

It is clear that no genuine issue exists with respect to many facts which are established by affidavit, admissions, irrefutable record, etc., and which are wholly uncontroverted, except possibly by argument as to import.

UNCONTROVERTED FACTS

Plaintiff is a resident of Illinois. All defendants are residents of Wisconsin. All defendants except defendants Pressentin and Dalton are of have been members of the Wisconsin State Board of Medical Examiners, which is the agency of the State of Wisconsin empowered to license physicians and surgeons in that state. Defendant Ross was a member of the board from July, 1955, to July, 1959, and from July, 1965, to July, 1969. Defendant Henney was a member of the board from July, 1959, through May 19, 1975. Defendant Zach was a member of the board from July, 1965, through July, 1969. Defendant Custer was a member of the board from approximately July, 1967, through July, 1971. Defendant Satory was a member of the board from approximately July, 1967, through July, 1971. Defendant Twohig was a member of the board from approximately July, 1967, through July, 1971. Defendant Withrow was a member of the board from approximately July, 1959, through July, 1963, and from July, 1965, through July, 1973. Defendant Lawton was a member of the board from approximately July, 1963, through approximately July, 1967.

Defendant Tormey was a member of the board from July, 1953, through July, 1963, and from July, 1965, through July, 1973. He was employed by the board as Executive Secretary from July, 1963, through July, 1965, served as Secretary of the Board from approximately February, 1954, through July, 1963, and from July, 1965, through July, 1973. Defendant Tormey was charged with the responsibility of handling the correspondence

of the Wisconsin State Board of Medical Examiners, continuously, from approximately February, 1954, through July, 1973.

Defendant Pressentin was employed as investigator and legal counsel by the Wisconsin State Board of Medical Examiners from approximately August 15, 1954, to December 31, 1965. In that capacity he was called upon to make investigations for the board and report on such investigations with respect to applications for relicensure by persons formerly licensed in Wisconsin as physicians.

Defendant Dalton is employed as an Assistant Attorney General by the State of Wisconsin, and has been so employed since 1955. He has acted as counsel to the Wisconsin State Board of Medical Examiners since June, 1968. In that capacity, he has rendered legal advice to the board and to members of the board, has appeared at board meetings at which plaintiff's relicensure was discussed, has participated in the conduct of hearings, and has engaged in investigative activity.

None of the defendants, Ross, Zach, Custer, Satory, Twohig, Withrow, and Lawton, ever communicated, either orally or in writing, information contained in the board's files with respect to plaintiff's attempt to obtain relicensure in Wisconsin, or activities related thereto, to the licensing boards, or members thereof, of any other state, or to prospective employers or associates of plaintiff. Defendant Henney, prior to his assuming the duties of Secretary of the Board in 1973, never communicated, either orally or in writing, information contained in the board's files

with respect to plaintiff's attempt to obtain relicensure in Wisconsin, or activities related thereto, to the licensing boards, or members thereof, of any other state, or to prospective employers or associates of plaintiff.

Defendant Pressentin never had any correspondence with the medical licensing boards, or members or employees thereof, in the states of Iowa, Illinois, New Jersey, Michigan, Indiana, Vermont or the District of Columbia, nor has he made investigations of plaintiff in such states or in the District of Columbia.

Defendant Dalton made three trips to Michigan in connection with the board's investigation of plaintiff or in preparation for plaintiff's hearing before the board. Except for these three trips to Michigan, defendant Dalton never communicated, either orally or in writing, with the medical licensing boards, or members thereof, of any other state, or with prospective employers or associates of plaintiff.

None of the defendants knowingly conveyed false information concerning plaintiff, nor directed, authorized, or acquiesced in the conveyance by anyone else of any false information concerning plaintiff to anyone. None of the defendants falsified records concerning plaintiff, nor directed, authorized, or acquiesced in the falsification by anyone else of any records concerning plaintiff.

Defendant Tormey on one occasion wrote a letter in which he made the misstatement that plaintiff had been found guilty of bribing a judge. He subsequently wrote to the addressee of the first letter stating that he had erred in making that

statement.

During March, 1968, LaVerne Stordock, who was at that time the investigator for the Wisconsin State Board of Medical Examiners and is now deceased, traveled to the State of Michigan for the purpose of making an investigation of plaintiff with respect to plaintiff's pending application for relicensure in the State of Wisconsin. Neither defendant Ross, Henney, Zach, Custer, Satory, Twohig nor Withrow has any personal knowledge as to what Stordock did while he was in the State of Michigan, or the manner in which he conducted the investigation which he had been directed to make. Stordock was directly simply to make an investigation with respect to plaintiff's activities in the State of Michigan. Neither defendant Ross, Henney, Zach, Custer, Satory, Twohig, nor Withrow authorized, directed or acquiesced in the preparation of any misleading reports by Stordock.

Defendant Lawton was not a member of the State Board of Medical Examiners in 1968. He has no knowledge whatsoever of the said trip taken by Stordock to Michigan.

OPINION

Construed liberally, the plaintiff's first cause of action may be read as incorporating the specific allegations that defendants, or some of them, or one of them, defamed him, and thereby violated his civil rights under color of law by:

1. Gratuitously and from improper motives sending out accurate information about him

to persons and agencies in other states who had made no request therefor.

2. Sending out false information about him to persons and agencies in other states who may or may not have requested information. (Such false information allegedly included matters not developed at the relicensure hearings, as well as the allegedly false results of those hearings.)

3. Participating in the falsification of investigative reports and other documents concerning him.

It is inescapable that as to the first cause of action, all defendants except Dalton, Tormey, and Pressentin are entitled to summary judgment in their favor on the basis of the undisputed facts that none of those other defendants communicated in any way with any persons in any other state about plaintiff, and that none of them directed, authorized, or acquiesced in the falsification of any records concerning him.

Except for the question of Statute of Limitations, which is dealt with hereinafter, on the present state of the record it is equally clear that the motion for summary judgment of defendants Dalton, Pressentin, and Tormey is not sound with respect to plaintiff's first cause of action. It is apparent, from the affidavits of defendants Tormey and Dalton, that they convey information concerning plaintiff to the licensing boards or to members of licensing boards of at least one other state, in Dalton's case, and of several states, in Tormey's case. Pressentin does not disclaim oral communication in his affidavit.

Whether the information conveyed was false, improperly disseminated, or otherwise grounds for a finding against these defendants, in the absence of a limitations' bar, should be determined at a trial.

SECOND CAUSE OF ACTION

For plaintiff's second cause of action, he alleges that all of the defendants conspired to perform all of the defamatory actions he alleges in the first cause. He does not set forth any specific facts which would tend to establish a conspiracy. In their answers to the complaint, defendants deny that they conspired to violate plaintiff's civil rights; and in their affidavits filed in support of this motion, each defendant avers that he never attempted in any way to prevent the licensure of plaintiff in any state other than Wisconsin; and at no time did he ever attempt, in any way, to preclude plaintiff's employment anywhere, or to discredit plaintiff with potential employers, associates, or anyone else.

Defendants also submit the deposition of Michael L. Sanfelippo, M.D., taken by the plaintiff, in which Dr. Sanfelippo testified that he was a good friend of plaintiff; that he had been a member of the Wisconsin State Board of Medical Examiners from 1961 to 1965; and that he had never heard the subject of the resolution of plaintiff's relicensure applications discussed outside of official meetings of the board.

Plaintiff has not submitted any opposing affidavit or other material which would tend to support

his allegation that a conspiracy existed among the defendants. The affidavit of his son Perry Margoles does not do so. In his brief, plaintiff argues that many materials show individual malice against him on the part of certain defendants, and he suggests that the existence of a conspiracy may be revealed by (1) a letter to "Tom" from defendant Ross, dated October 28, 1965, suggesting a dinner meeting at a restaurant to discuss plaintiff's situation, because writings were not desirable; (2) a "stream" of newspaper clippings "sent around" by defendant Ross, with Ross's comments attached; (3) an undated, unsigned memorandum in the board's confidential file, which indicates that defendant Ross "seems to have been doing some investigating on his own about some of the matters involving Dr. Margoles"; and (4) an unsigned memorandum sent to certain board members, dated December 10, 1965, complaining about a lack of effectiveness by the board's investigator. Plaintiff has submitted what appear to be copies of these letters and memoranda, but they are neither certified nor identified by affidavit and cannot be said to be properly before the court on a motion for summary judgment. Even considering them so, however, they fall far short of even suggesting conspiracy. An essential element of conspiracy is agreement between two or more persons. The documents submitted by plaintiff at best suggest the possible mental attitude toward plaintiff of one person (with the exception of the memoranda which cannot be clearly attributed to anyone). These materials show no indication whatsoever of an agreement of any kind between two or more defendants here.

At the pleading stages of this proceeding, the

court denied a motion by defendants to dismiss this cause of action for failure to state a claim upon which relief could be granted. Since the denial of that motion in 1970, the plaintiff has had more than an ample opportunity to develop some evidence of conspiracy, if such existed, through the taking of depositions, the propounding of interrogatories, and the production of documents; but he has failed to produce any factual material on this issue in opposition to defendants' sworn statements. Plaintiff is not required to try a genuine issue of material fact on affidavits, but he can't make a genuine issue out of extravagant allegations for which he can develop no evidence whatsoever. It must be concluded that plaintiff has shown no genuine issue of material fact on his second alleged cause of action and summary should be allowed for defendants on the charge of conspiracy.

THIRD CAUSE OF ACTION

In his third cause of action, plaintiff alleges that defendant Ross slandered him "on or about June 15, 1968." Defendant Ross denies that he slandered plaintiff as alleged. Defendant Ross also alleges that the interview during which the slanderous statement was alleged to have been uttered took place before June, 1968, and that the right of action set forth in plaintiff's complaint did not accrue within two years next before the commencement of the action. Wisconsin Statutes S. 893.21(2) clearly provides that actions to recover damages for slander must be commenced within two years, and this action was filed June 11, 1970.

The record does not reveal the precise date of the subject interview. The deposition of the

interviewer, Margaret E. Bauman, is before the court, and Ms. Bauman testified that the interview took place in late May or in June of 1968, but that she could not recall the specific date. She produced a typed draft of a proposed news article (which was not published), dated June 15, 1968, which she stated she prepared sometime after her interview with defendant Ross. The burden is on defendant Ross to establish that the interview took place prior to June 11, 1968, if he wishes to rely on the affirmative defense of the statute of limitations. A genuine issue is clearly present as to that material fact on this possible defense.

With respect to statements made during the Bauman-Ross interview, there are also genuine issues of material fact. Dr. Ross denies slanderous statements under oath. The Bauman deposition, while far from precise, does indicate that defendant Ross may have made statements about plaintiff which could be considered slanderous on the matter of possible abortions. If this third cause of action is not barred by the statute of limitations, trial is necessary to resolve issues over what was said, and such issues are both genuine and material.

THE APPLICABLE STATUTE OF LIMITATIONS

No federal limitation having been established, it is clear that actions brought pursuant to Section 1983 of Title 42, United States Code, are limited by the state limitations on the closest analogous state tort action. O'Sullivan v. Felix, 233 U.S. 318 (1914); Jones v. Jones, 410 F.2d 365 (7 Cir. 1969) See also Johnson v. Railway Express Agency,

__U.S.__ (#73-1543 decided May 19, 1975), affirming 489 F.2d 525.

It is clear that the alleged injury for which plaintiff seeks redress in the first cause of action here, as well as in the third, is defamation of his character and reputation, which he says has prevented his obtaining licensure and employment in his profession to the extent he desires.

As noted above, the Wisconsin Statute of Limitation on "An action to recover damages for liber, slander * * *" is two years. Wisconsin Statutes S. 893.21(2). Another statute, however, permits within six years "An action to recover damages * * * for an injury to the character or rights of another, not arising on contract, except in case where a different period is expressly prescribed." Wisconsin Statutes S. 839.19(5). Which statute is applicable here is of major significance because of the long period over which allegedly actionable statements about plaintiff were made by defendant Tormey.

The Wisconsin Supreme Court has considered the alternative applicability of these two statutes in a case involving statements about a man in an alleged attempt to have him deported. The court found the two-year period, limiting libel and slander actions, to be applicable, rather than the longer six-year period on actions for injuries to "character or rights." Cordova v. Gutieriez, 23 Wis. 2d 598, 128 N.W. 2d 62 (1964). This seems eminently sound, especially because the latter statute expressly excepts cases where another period is prescribed, as for libel or slander here.

It is just not possible to make plaintiff's first cause of action anything but an action for damages arising from false and derogatory statements, which is classic libel or slander. The federal action made possible by the civil rights statute doesn't change the nature of the alleged injury in any way. Accordingly, it must be held that plaintiff will be limited in his proof at trial, on his first cause of action, to communications by defendants Dalton and Tormey, which occurred on or after June 11, 1968, two years before this action was filed. Since it is clear that defendant Pressentin was not employed by the Board after December 1, 1965, and could not therefore have taken any relevant action under color of state law within the limitations' period, the motion for summary judgment must be allowed as to him on the gound of the Statute of Limitations.

FOURTH CAUSE OF ACTION

In his fourth cause of action, set up by the amended complaint, plaintiff attacks the fairness and validity of the 1969 hearing accorded him by defendants on his application for relicensure in Wisconsin. He says he has been denied procedural due process of law. The answer of all defendants, as lately amended with leave of court, sets up res judicata as complete affirmative defense to this alleged fourth cause of action.

In argument against the present motion for summary judgment, plaintiff says, in substance, that defendants withheld from him favorable evidence, that they relied on evidence which they knew was disputed by other evidence, and that they

misinterpreted a suggestion that he wanted a Wisconsin license only to help get one in Illinois, and that he would surrender a Wisconsin license, if granted, when that was accomplished.

The validity of plaintiff's 1969 hearing before the Board was the subject of the Wisconsin Supreme Court's decision in Margoles v. State Board of Medical Examiners, 47 Wis. 2d 499 (1970). That case came there on appeal pursuant to Wis. Stat. S. 227.21, to review a Dane County, Wisconsin, Circuit Court judgment affirming a decision of the Wisconsin State Board of Medical Examiners denying a favorable recommendation for restoration of plaintiff's license. The State Supreme Court decision is well written and highly illuminating and need not be repeated here.

The Wisconsin Supreme Court concluded that plaintiff had been afforded complete due process, in that a full hearing was held involving all the fair play procedures required. The court found that the records of earlier board proceedings in 1965 and in 1967 had been made available to plaintiff and his counsel prior to the 1969 hearing; that the contents of the investigative report filed by LaVerne Stordock had been made known to plaintiff and to his counsel; and that plaintiff's counsel had given information "tending to refute every adverse statement or report given by Mr. Stordock." (Id. at 511.) The court also found substantial evidence to support the board's findings, and that the findings supported the conclusions of law which justified the decision not to recommend plaintiff's relicensure.

Plaintiff argues here that the doctrine of res judicata is inapplicable because the state court case was in the nature of an administrative review on the matter of licensure, while this case is a suit for damages, an "entirely distinct and separate" cause of action. However, this is simply not the test. The fourth cause of action asserted here is alleged denial of due process of law in the whole license proceeding. Whether "due process" actually was denied by the board with which defendants here are involved was clearly an issue which was presented to and carefully dealt with by the Wisconsin courts, including the Supreme Court of the State of Wisconsin in its 1970 opinion cited above. Plaintiff offers nothing to dispute that as a factual matter. Since plaintiff has previously been given a hearing, which was reviewed for fairness by a court of competent jurisdiction on the merits of the same issue he seeks to raise here, and he did not seek further review in that case, this court should not entertain, and indeed has no jurisdiction for, relitigation of that identical issue or cause of action.

The purpose of the doctrines of res judicata and collateral estoppel is to eliminate repetitious suits, resulting harassment of parties, and the consequent waste of judicial time.

> "The rule (of res judicata) provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or

demand, but as to any other admissible matter which might have been offered for that purpose.' * * * Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." Commissioner v. Sunnen, 333 U.S. 591, 597-598 (1948).

It is clear that the Wisconsin Supreme Court, in deciding upon the issue of whether the hearing afforded plaintiff due process, considered the requirements of the federal constitution as asserted by plaintiff. The choice in submitting this federal constitutional question to the Wisconsin Supreme Court was plaintiff's. He did not commence an action based on alleged violation of his civil rights after the hearing complained of, but, rather, sought review in the Circuit Court for Dane County, Wisconsin, followed by an appeal to the Wisconsin Supreme Court. Having chosen that method of approach in the courts of the State of Wisconsin, his clearly available remedy, if he believed that the Wisconsin Supreme Court was in error on the question of due process, was to petition the Supreme Court of the United States for certiorari. He did not do so. He now seeks to start over on the same issue at the trial level in the federal court system. That is not to be permitted.

The Supreme Court has stated in England v. State Board of Medical Examiners, 375 U.S. 411 (1964):

"***that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then--whether or not he seeks direct review

of the state decision in this Court--he has elected to forgo his right to return to the District Court." 375 U.S. at 419

That was simply reaffirmation of the rule of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), also lately followed in Hutcherson v. Lehtin, 485 F.2d 567 (9 Cir. 1973).

The principles of those decisions on this point are controlling here. There exists no right to relitigate the same due process issue in this proceeding. The motion for summary judgment must be allowed as to the fourth cause of action on the ground of res judicata.

Accordingly, IT IS ORDERED as follows:

1. The motion for summary judgment on behalf of defendants ROSS, HENNEY, ZACH, CUSTER, SATORY, TWOHIG, WITHROW, LAWTON, and FRESSENTIN with respect to the first cause of cation alleged is ALLOWED.

2. The said motion on behalf of defendants DALTON and TORMEY with respect to said first cause of action alleged is DENIED, subject to limitation of proof to the two-year period prior to June 11, 1970.

3. The said motion with respect to the second cause of action involving alleged conspiracy by all defendants is ALLOWED.

4. The said motion with respect to the third cause of action is DENIED.

5. The said motion with respect to the fourth cause of action alleged is ALLOWED, through application of the doctrine of res judicata.

IT IS FURTHER ORDERED that the facts stated hereinabove as uncontroverted appear without substantial controversy within the meaning of Rule 56(d), F.R.Civ.P., and shall be deemed established upon trial herein, insofar as any such facts are material to remaining issues.

Robert D. Morgan
United States District Judge
Southern District of Illinois
(Sitting in the Western District
of Wisconsin by designation of
the Chief Judge of the Seventh
Federal Circuit)

entered: July 25, 1975

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No. 80-1734

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DR. MILTON MARGOLES,
Petitioner,

v.

DR. THOMAS W. TORMEY, JR.,
and LEROY L. DALTON,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

1. Whether petitioner was denied his rights to procedural due process by the licensing authorities of the State of Illinois.

2. Whether the evidence establishes the respondents' active involvement in or distortion of the Illinois licensure proceedings.

3. Whether the evidence establishes that respondents' defamation (assuming such defamation for the sake of argument only) was in conjunction with the denials of licensure in Illinois.

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No. 80-1734

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ON WRIT OF CERTIORARI TO THE
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RESPONDENTS' BRIEF

OPINIONS BELOW

The petition adequately and fully identifies the opinions below. It is the March 12, 1981, opinion of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's granting of judgment notwithstanding the verdict, which is here under consideration.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

STATUTE INVOLVED

42 U.S.C. sec. 1983 — Civil action for deprivation of rights:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Since respondents agree with substantial portions of the material set forth in the petitioner's statement of facts, respondents set forth herein only those facts with which they disagree.

Respondents disagree with the numbered paragraphs set forth on page four of the petition and identified by petitioner as "key facts." While it is certainly true that by making affirmative answers to certain of the questions on the special verdict, the jury found those matters as fact, and while certain assumptions were made by the Court of Appeals, the posture of this case does not permit the conclusion that such matters are established fact.

Respondents disagree with the content of pages eight and nine of the petition. Again, while there was some evidence at trial to support the alleged facts with respect to the affidavit, and while the jury appears to have accepted that evidence, respondents do not agree that those matters have been established as fact.

On page sixteen of the petition, petitioner states that in addition to seeking reinstatement of Count I as to respondents herein, he also seeks reinstatement of Count IV as to all of the original defendants. Count IV is inappropriately referred to with respect to this petition since it was not a subject of the appeal of which petitioner seeks this court's review. It was the subject of the earlier appeal to the United States Court of Appeals for the Seventh Circuit decided on August 15, 1978 (Pet. App. A-28).

REASONS FOR DENYING THE WRIT

I. Introduction.

At the outset it should be noted that respondents disagree with petitioner's entire analysis of this case. Despite petitioner's efforts to present this case as involving complex constitutional issues, it is, as decided by the Court of Appeals, essentially a sufficiency of the evidence case. The decision of the Court of Appeals (excluding several pages of background and introduction) is relatively brief, straightforward, easy to understand and it flows smoothly and logically from one point to the next. In a sentence, the Court of Appeals held that there was no foreclosure by Illinois authorities of petitioner's rights to procedural due process (Pet. App. A-8), that petitioner failed to prove respondents' active involvement in or distortion of licensure proceedings in Illinois (Pet. App. A-9), and that petitioner has failed to prove that the respondents were connected with the denial of licensure in Illinois, thereby failing to meet the second prong of the "stigma plus" test (Pet. App. A-13).

II. Petitioner Was Afforded Procedural Due Process.

On this point there is no dispute. The Court of Appeals held that there was no allegation that Illinois officials had denied petitioner a fair hearing, that, as a matter of fact, uncontradicted evidence established more than ample opportunity to be heard, and that there was, therefore, "no foreclosure by any Illinois authorities of plaintiff's rights to procedural due process." (Pet. App. A-8). Petitioner agrees (Pet. 17-18).

III. Petitioner Was Afforded A Fair Hearing.

Having concluded that petitioner was afforded full due process at his hearings before Illinois authorities, the court proceeds next, in its analysis, to the question of whether respondents could have unconstitutionally interfered with petitioner's right to a fair hearing in Illinois in some other fashion. The court examines the possibility that the fairness of the hearing could have been affected by an extremely active role in the Illinois proceedings by respondents, but concludes that the District Court was correct in holding that petitioner simply "failed to prove defendants' *active involvement in or distortion of* the Illinois proceedings." (Pet. App. A-9).

Petitioner attempts to read confusion in the court's observation that the case would be different if there were some evidence of collusion or conspiracy and seeks help in Judge Cudahy's concurring opinion. But there is no suggestion in the opinon that collusion or conspiracy must be shown to meet the test, only that such a showing would in fact have been adequate. On the contrary, the court carefully points out that it does not attempt to determine the extent of involvement which would be necessary by an official of one state or government entity in the proceedings of a second state or entity for the reason that whatever degree of involvement would be necessary to establish a claim under 42 U.S.C. sec. 1983, the facts of this case do not meet it (Pet. App. A-9, f.n. 8). The evidence in this case is so weak that it does not require a determination of the precise test. In short, petitioner's claim dies because of insufficiency of the evidence. That is not a constitutional issue and is undeserving of this Court's attention.

IV. Petitioner Has Failed To Establish Both Prongs Of The "Stigma Plus" Test.

In its analysis of this question, the Court of Appeals assumes that respondents maliciously or in bad faith provided the false information about petitioner to Illinois officials, while expressing serious doubt as to whether petitioner did, in fact, prove either falsity or maliciousness (Pet. App. A-9-A-10). Petitioner argues, based upon the assumption of falsity and maliciousness, that the court's conclusion that respondents were connected with the denial of licensure in Illinois results in one of two inevitable conclusions: first, that the decision is in conflict with the criteria; or second, that the decision is distinguished because of the interstate setting.

It is respectfully submitted that one of those two conclusions is not inevitable. A third conclusion which can follow the court's analysis and its assumption, for the sake of argument only, that respondents supplied false information to Illinois, and that they were malicious in doing so, is precisely the conclusion that the court reached. Petitioner failed to prove that respondents were connected with the denial of licensure. "The affiliation between stigma and denial of a government benefit is absent. ... [p]laintiff's claim fails to establish that defendants' defamation was *'in conjunction'* with the denials of licensure in Illinois. The Illinois authorities and the Illinois denials of licensure were separate and distinct from any defamatory statements made by these Wisconsin officials." (Pet. App. A-13).

Petitioner seems to adopt the position that the causal connection between the alleged defamation and the denial of licensure follows from the jury's conclusion that it did. But that begs the question. The District Court granted judgment notwithstanding the verdict and the Court of Appeals has affirmed. The Court of Appeals has plainly held, and indeed has stated that petitioner "has failed to prove that these defendants were connected with any denial of a government benefit or privilege, i.e. licensure." (Pet. App. A-13). Again, petitioner's claim fails as a result of insufficiency of the evidence, not as a result of misapplication of the law.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that this case does not present a significant question of law requiring resolution by this Court. The Court of Appeals has held, assuming, for the sake of argument only, that respondents distributed false information with a malicious intent, that petitioner has failed to prove that such action resulted in a loss of fairness in the hearing with petitioner received in Illinois, or that such action was done in conjunction with the denial of licensure by Illinois officials. It is respectfully submitted that the petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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